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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ABDUL H. KHAN, YASMEEN HASEEB,
SARAH HASEEB, SANA HASEEB,

Petitioners,

—v.—

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but which bar review of most discretionary claims and certain factual findings. The courts of appeals sharply disagree, however, about how to differentiate "questions of law" from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Seventh Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where he challenged only the application of the statutory eligibility standards to the facts of his case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny an asylum application as untimely.

PARTIES TO THE PROCEEDING

Petitioners are Abdul H. Khan, Yasmeen Haseeb, Sarah Haseeb and Sana Haseeb. Petitioners were also petitioners in the court of appeals, but were respondents before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Eric H. Holder, Jr. The respondent in the court of appeals was then Acting Attorney General Mark Filip.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Abdul H. Khan, Yasmeen Haseeb, Sarah Haseeb and Sana Haseeb respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 3a)[1] is reported at 554 F.3d 681. There were no district court proceedings. The decision and order of the immigration judge (App. 35a), and the decisions of the Board of Immigration Appeals (App. 26a, 30a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. Rehearing en banc was denied on April 1, 2009. Justice Stevens extended the deadline for filing a petition for a writ of certiorari, until the current date of August 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 71a-78a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I,

[1] "App." refers to the appendix attached to this petition.

§ 9, Cl. 2; and 8 U.S.C. 1158(a)(2), 1158(a)(3), 1252(a)(2)(B), and 1252(a)(2)(D).

STATEMENT

In 1996, Congress enacted a 1-year filing deadline for asylum applications, but tempered that rule with two statutory exceptions. Here, Mr. Khan argued that he satisfied the "extraordinary circumstances" exception because he suffered from serious post-traumatic symptoms due to his experiences in Pakistan, and that those symptoms significantly impaired his ability to apply for asylum upon arriving in the United States. The Board of Immigration Appeals rejected that contention and thus refused to consider his late-filed asylum application. The Seventh Circuit held that it lacked jurisdiction to review the extraordinary circumstances determination and that jurisdictional ruling is the subject of this petition.

A. Statutory Background.

1. The Filing Deadline Provisions. To qualify for asylum, applicants must show that they cannot return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). The "well-founded fear" standard does not require asylum applicants to demonstrate that persecution is a certainty, or even that it is more likely than not to

occur. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 449-50; *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988). Rather, an applicant may establish a well-founded fear even if he "only has a 10% chance" of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 440.

In 1996, for the first time, Congress enacted a filing deadline, requiring asylum seekers to file within one year of arrival in the United States. 8 U.S.C. 1158(a)(2)(B); 8 U.S.C. 1158(a)(2)(D). But, in response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation, for *changed* or *extraordinary* circumstances:

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 U.S.C. 1158(a)(2)(D). *See* 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining that the "changed" and "extraordinary" exceptions were added out of the "concern" that asylum remain "available for those with legitimate claims").

Congress recognized that there would often be legitimate reasons for an alien's failure to submit a timely application and that these exceptions were thus critically important given the life and death stakes at issue. *See* 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch) (emphasizing that "the two exceptions" are intended to "provide adequate protections to those with legitimate claims of asylum"). Among the various examples cited by Congress were aliens who failed to apply within one year but subsequently obtained "more information about likely retribution [they] might face if [they] returned home," 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch), or who learned their "home government may have stepped up its persecution of people of [their] religious faith or political beliefs," 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

Congress made clear that these exceptions were to be given a liberal interpretation to ensure that no alien with a genuine claim for asylum would be turned away for failing to apply within the deadline. 142 Cong. Rec. S11838-01, S11839-40 (statement of Sen. Hatch) (stating that the "important exceptions" are meant to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies"). *See also id.* (statement of Sen. Abraham) (emphasizing the need for close congressional "attention to how the provision is interpreted" to ensure that the exceptions "provide

sufficient protection to aliens with bona fide claims of asylum").

The statutory exceptions have been given further content through regulations. The regulations define the terms "changed circumstances" and "extraordinary circumstances" and provide a non-exclusive list of circumstances that may excuse an untimely filing. 8 C.F.R. 208.4(a)(4), (5) (reprinted at App. 74a-78a). The regulations state that the term "extraordinary circumstances" shall refer to "events or factors directly related to the failure to meet the 1-year deadline . . . as long as the alien filed the application within a reasonable period given those circumstances." § 208.4(a)(5). Of particular relevance here, "serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past," may qualify as an extraordinary circumstance. § 208.4(a)(5)(i).

2. The Jurisdictional Restrictions. The courts of appeals may review claims concerning the asylum filing deadlines, but only to the extent that petitioners are raising constitutional claims or questions of law. That limitation results from the interaction of a 1996 jurisdiction-*stripping* provision and a 2005 jurisdiction-*restoring* provision. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310.

In 1996, Congress enacted a series of jurisdictional bars that cover a range of immigration decisions and claims. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001) (discussing bar applicable to removal orders based on criminal convictions); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (discussing bar on review of certain discretionary determinations).

The specific jurisdictional bar at issue here is located at 8 U.S.C. 1158(a)(3). It provides that the courts may not "review" claims relating to the asylum filing deadline. Under this bar, the courts of appeals are thus precluded from reviewing all claims (factual, discretionary and legal) relating to whether the applicant satisfied one of the statutory exceptions for late-filed asylum applications.

In 2005, however, Congress partially restored review when it enacted 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) is a generally applicable provision that applies to all of the jurisdictional bars (with exceptions immaterial here) in the Immigration and Nationality Act (INA). It provides that the courts of appeals may exercise jurisdiction over "constitutional claims" and "questions of law" and may do so notwithstanding the INA's existing jurisdictional restrictions (including the bar on reviewing claims related to the asylum filing deadline).

The impetus for Section 1252(a)(2)(D) was this Court's 2001 decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held

that although the bar eliminated the courts of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 314. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court also made clear that Congress remained free to enact a substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and generally eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to restore the courts of appeals' petition-for-review jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).

In short, as the courts of appeals have uniformly recognized, the jurisdictional question presented in asylum filing cases is whether applicants are raising constitutional claims or questions of law. If they are raising such claims, then the courts of appeals have jurisdiction to review those claims, notwithstanding the jurisdictional bar set forth in 8 U.S.C. 1158(a)(3). The controversy has centered on what types of claims constitute "questions of law" for purposes of Section 1252(a)(2)(D).

More particularly, the courts of appeals uniformly agree that they may review constitutional claims and what they view as *pure* questions of law. Similarly, the courts of appeals uniformly agree that they may not review discretionary claims or pure factual claims – what this Court has called "basic," "primary" or "historical" facts. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The disagreement concerns whether the courts of appeals may review a claim, like Mr. Khan's, where the underlying facts are accepted and the petitioner is arguing only that, on those facts, he satisfied one of the statutory exceptions – what this Court has variously described as a "mixed" question of law and fact or one involving the "application" of law to fact. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995).

B. Petitioner's Administrative Proceedings.

1. The lead petitioner in this case, Abdul H. Khan, is a native of Pakistan who last came to the United States in 1998 with his wife and two children, who were then one and four years old.[2] In 2003, Mr. Khan affirmatively applied for asylum before an asylum officer. 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9. The application was referred to an immigration judge and Mr. Khan was placed in removal proceedings, charged with being out of status. He conceded removability on the basis of his expired visa but renewed his asylum application under 8 U.S.C. 1158. He also applied for other forms of relief, including withholding of removal under 8 U.S.C. 1231(b)(3).

Before the immigration judge, Mr. Khan testified that he feared returning to Pakistan, where he had previously been a member of the Mohajir Quami Movement (MQM), a political party representing the interests of mohajirs (Pakistanis who emigrated from India in 1947, and their direct descendants). App. 39a. Mr. Khan stated that he left the MQM after the MQM kidnapped his brother for disobeying orders by the party leaders. App. 39a-40a. MQM members subsequently threatened Mr.

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[2] Although Mr. Khan's wife and children are parties to the proceedings in this Court, and were parties in the court of appeals, he is the lead petitioner and their claims are derivative of his claim. For simplicity, therefore, this petition refers to only one petitioner, Mr. Khan.

Khan's family, and hijacked his car when he was driving with his wife and daughters "as retribution for his refusal to donate" to the party. App. 41a-42a. Mr. Khan came to the United States in 1998 to avoid the MQM, but returned shortly thereafter when his daughter fell ill. App. 42a. On his return to Pakistan, MQM members kidnapped and beat him, and threatened him with severe consequences, showing him severed fingers, among other things. In response, he fled the country with his family. App. 42a-43a.

2. The immigration judge concluded that Mr. Khan was statutorily ineligible for asylum, finding that he had not timely filed his application and had not demonstrated "extraordinary circumstances" justifying the late filing. App. 49a-51a. Mr. Khan argued that he satisfied the extraordinary circumstances exception based upon the post-traumatic symptoms he experienced upon his arrival in the United States. He testified that he was "upset, afraid, and depressed" upon arrival and that he feared "the United States would disclose information about him to the Pakistani government" that would endanger members of his family remaining in Pakistan. App. 49a. His wife testified that he had been "in a constant state of fear" before they left Pakistan and that he remained very anxious and depressed once they arrived in the United States. App. 44a. She said that although he was able to work as a taxi driver, he often remained at home and refused to talk about what had happened in Pakistan. App. 45a.

Petitioner's friend, Mohammed Khan (no relation to petitioner), testified that Mr. Khan's mental condition was not good when he arrived in the United States and that it "worsened" in the months after his arrival. App. 46a. He stated that Mr. Khan was "stressed and unable to make decisions" and that he "chose not to associate himself with any other Pakistanis in the U.S., even though he had been 'very sociable' in Pakistan." *Id.*

The immigration judge did not dispute that Mr. Khan suffered from depression when he arrived in the United States. The judge noted, however, that Mr. Khan was able to "work as a cab driver, rent an apartment, support his family, and function without any difficulties." App. 50a. The immigration judge thus concluded that his "state of depression when he arrived [did not] prevent[] him from filing for asylum within 'a reasonable period of time' after the one-year time limit." App. 50a-51a (citing regulations). Consequently, the immigration judge found that Mr. Khan did not satisfy the extraordinary circumstances exception. *Id.*

The immigration judge also denied relief under the Convention Against Torture, finding that Mr. Khan failed to establish that he would likely be tortured if removed to Pakistan. App. 68a. The judge further held that Mr. Khan was ineligible for withholding of removal, concluding that he failed to

establish that he was persecuted on account of his political opinion. App. 64a-66a.[3]

3. The Board of Immigration Appeals (Board or BIA) affirmed in a short per curiam opinion on the basis of the immigration judge's decision. App. 26a-29a. The Board also denied petitioner's motion to reopen, which contained additional medical evidence of his psychiatric disorder. App. 30a-34a. Although the medical examinations submitted by Mr. Khan reported post-traumatic symptoms of "depression, nightmares, anxiety, anger, and frustration," as well as "problems with concentration and stress," the Board denied the motion to reopen, finding that the examinations did not present any new, material evidence that was not before the immigration judge. App. 32a, 34a

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[3] Like asylum, withholding requires aliens to show that they will be persecuted on one of the five specified grounds, but there is no filing deadline and it is mandatory for those who qualify (unlike asylum, which can be denied as a matter of discretion even to those who meet the statutory requirements). *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999). Withholding applicants, however, must meet a far higher burden of proof than asylum applicants – a "more likely than not" standard, rather than the "well-founded fear" standard. *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988) (noting that "it is easier to prove well-founded fear of persecution than clear probability of persecution" required for withholding); *Cardoza-Fonseca*, 480 U.S. at 449-50 (stating that the well-founded fear standard permits a grant of asylum to "one who fails to satisfy the strict [withholding] standard").

C. The Seventh Circuit's Decision.

1. The court of appeals denied Mr. Khan's withholding and CAT claims, as well as his motion to reopen, and those merits rulings are not at issue in this petition. App. 21a-22a, 24a-25a.[4] The court of appeals also dismissed Mr. Khan's asylum claim, finding that it lacked jurisdiction to review whether he satisfied the statutory exceptions for late-filed applications. Accordingly, the Seventh Circuit did not reach the merits of whether Mr. Khan had demonstrated changed or extraordinary circumstances (or the ultimate merits of his asylum claim). App. 15a-17a.

2. Mr. Khan does not challenge the underlying, historical facts found by the immigration judge. Nor does he challenge any ultimate discretionary authority an immigration judge may possess to find an asylum application untimely even where the statutory exceptions are satisfied. Rather, he challenges only whether, on the facts found by the immigration judge, he satisfied the statutory exceptions for late-filed applications -- a "mixed" question of law and fact or one involving the "application" of law to fact. The Seventh Circuit nonetheless concluded that it lacked jurisdiction because, in its view, Mr. Khan had not raised

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[4] The Seventh Circuit reached the merits of the motion to reopen without citing its precedent decision in *Kucana*, which held that motions to reopen are unreviewable discretionary decisions. *See Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert. granted* (U.S. Apr. 27, 2009) (No. 08-911).

"questions of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). The court of appeals rested that holding on three principal conclusions.

First, the court of appeals held that, in general, Section 1252(a)(2)(D)'s reference to "questions of law" was not intended to cover "mixed questions of law and fact." App. 11a-13a. The court further held that the absence of all review over mixed questions of law and fact raised no constitutional concerns under the Suspension Clause. The Seventh Circuit acknowledged this Court's *St. Cyr* decision, but read the decision as ensuring review only over questions of statutory construction, and not the application of law to fact. App. 13a-14a.

Second, the court of appeals concluded that Mr. Khan's claim was unreviewable because it raised a "discretionary issue." App. 11a, 16a-17a. The court explained that, in its view, the fact that the asylum-filing provision (8 U.S.C. 1158(a)(2)(D)) uses the term "to the satisfaction of" the Attorney General was a strong indication that decisions under it are "'inherently discretionary' and not reviewable." App. 11a (quoting *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005)).[5]

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[5] The Seventh Circuit also seemed to suggest (at App. 11a) that Mr. Khan's claim was discretionary because the statute provides that an untimely application for asylum "*may* be considered" if the applicant demonstrates changed or extraordinary circumstances. 8 U.S.C. 1158(a)(2)(D) (emphasis added). In this case, however, the immigration judge held that

Third, the court of appeals held that Mr. Khan's claim was not only discretionary but also "factual." App. 16a. In the Seventh Circuit's view, an asylum seeker who claims that his facts satisfy the governing legal standards is simply raising a question regarding the sufficiency of the evidence. App. 15a n.3.

The Seventh Circuit recognized that its holding was in conflict with the Ninth Circuit's jurisdictional position. It stated, however, that it was "not persuaded" by the Ninth Circuit's reasoning. App. 11a-12a n.2.

3. On April 1, 2009, the court of appeals denied rehearing en banc. App. 1a-2a. This petition followed.

Mr. Khan had not met the statutory eligibility standards for filing a late application (*i.e.*, the changed or extraordinary circumstances criteria). Thus, this case does not raise the question of whether the term "may" in the statute provides immigration judges with discretion to deny an application as untimely even where the applicant has demonstrated changed or extraordinary circumstances. And because the immigration judge did not reach the merits of the asylum application, the case also does not involve the agency's discretion to deny an asylum application even where the alien establishes a well-founded fear of persecution.

REASONS FOR GRANTING THE WRIT

This Court's review is warranted because of the issue's enormous practical importance to asylum seekers; because eleven circuits have addressed the issue and are divided in result and analysis; and because the Seventh Circuit's decision cannot be squared with the relevant statutory text and legislative history, or this Court's habeas decisions in *St. Cyr* and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

Moreover, the Seventh Circuit's conclusion in this case rests on the same basic jurisdictional reasoning that has led to circuit conflicts in a number of other substantive immigration areas. Thus, the jurisdictional issue in this case has broad significance beyond the asylum context. *See Zhang v. Gonzales*, 457 F.3d 172, 180-81 (2d Cir. 2006) (Calabresi, J., concurring) (noting the need for this Court's guidance in immigration cases on how to differentiate unreviewable claims from those that involve "applications of contoured statutory language to a given set of facts").

This case presents the Court with an ideal vehicle to resolve the jurisdictional conflict at issue here. The Seventh Circuit squarely addressed the issue in a comprehensive opinion and there is no obstacle that will prevent the Court from reaching the issue.

I. THE SEVENTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The Statutory Exceptions To The Asylum Filing Deadline.

1. Mr. Khan raises a claim involving the application of law to fact (*i.e.*, a mixed question of law and fact): whether, on the facts of his case, he satisfied one of the statutory exceptions to the filing deadline. With the exception of the D.C. Circuit, every circuit has addressed whether they may review that question. They are divided in a 1-9-1 split. The Ninth Circuit reviews whether asylum seekers have, on the facts of their case, satisfied the statutory exceptions to the deadline; nine circuits (including the Seventh) refuse to review such claims; and the Second Circuit has taken a middle approach.

In *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007), the Ninth Circuit squarely held that it may review whether asylum applicants have, on the facts of their case, satisfied one of the statutory exceptions excusing the filing deadline. And, since *Ramadan*, the Ninth Circuit has consistently reaffirmed and applied that jurisdictional ruling. *See, e.g.*, *Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008); *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

In direct contrast, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have held that they may not review such claims. *Hana v. Gonzales*, 503 F.3d 39, 42 (1st Cir. 2007); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed* (U.S. Aug. 11, 2009) (No. 09-194); *Niang v. Gonzales*, 492 F.3d 505, 510 n 5 (4th Cir. 2007); *Zhu v. Gonzales*, 493 F.3d 588, 596 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); App. 3a (decision in this case); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

The Second Circuit has been less categorical. It has held that it may generally review the application of law to fact (mixed questions of law and fact) under 8 U.S.C. 1252(a)(2)(D). *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006). But it has also stated that, in reviewing the asylum filing exceptions, the court must examine the "precise arguments" advanced by petitioners to determine whether they have raised a reviewable question of law. *Chen*, 471 F.3d at 330; *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 141 (2d Cir. 2008) (per curiam) ("[l]ooking to the 'precise arguments of the petition'" to determine whether petitioner's challenge to the agency's changed and extraordinary

circumstances determination raises a reviewable question of law) (quoting *Chen*).

There is thus a direct and acknowledged conflict among the courts of appeals on an issue that has arisen in hundreds of cases over the last few years. In the Ninth Circuit, asylum seekers may obtain review of whether they satisfied one of the statutory exceptions for late-filed applications; in the Second Circuit review is a possibility, based on a case-by-case assessment; in the other nine circuits review is unavailable and asylum seekers are deported based solely on the administrative agency's determination that they failed to satisfy the statutory standards.

The split is also entrenched. As the above citations indicate, the lead published case in every circuit (with the exception of the Fourth) dates back at least two years; moreover, each of these circuits has issued multiple decisions over the years reaffirming its position. In fact, the circuits have all issued *at least* one decision in the last six months adhering to their now-settled position.[6] At this

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[6] *See, e.g.*, *Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. May 22, 2009); *Baig v. Holder*, No. 08-4498, 2009 WL 1788612, at *1 (2d Cir. June 24, 2009) (unpublished summary order); *Sutiowijono v. Att'y Gen.*, No. 08-3188, 2009 WL 1459680, at *1 (3d Cir. May 27, 2009) (unpublished per curiam); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed* (U.S. Aug. 11, 2009) (No. 09-194); *Singh v. Holder*, No. 08-60289, 2009 WL 1345946, at *1 (5th Cir. May 13, 2009) (unpublished per curiam); *Perez-Deleon v. Holder*, No. 08-3494, 2009 WL 1474717, at *4 (6th Cir. May 27, 2009) (unpublished); *Novary v.*

point, the courts of appeals are largely issuing short, unpublished decisions based on their lead decisions. There is thus no realistic prospect that the issue will be resolved through further litigation in the courts of appeals.

2. Moreover, the courts of appeals are divided not only in result, but also in analysis. *First*, the courts of appeals are deeply divided on the threshold question of whether, as a general matter, the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law. Six circuits (the Second, Third, Fourth, Eighth, Ninth, and Eleventh) have correctly held that the application of law to fact falls within the term "questions of law" and is thus reviewable under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 650; *Chen*, 471 F.3d at 324-30; *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) (per curiam); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

In contrast, three circuits (the Sixth, Seventh, and Tenth) have taken a more narrow view of

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Holder, 313 F. App'x 869, 872 (7th Cir. Mar. 3, 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. June 26, 2009); *Tuiwainikai v. Holder*, No. 05-73295, 2009 WL 1370541, at *1-2 (9th Cir. May 18, 2009) (unpublished mem.); *Sinaga v. Holder*, No. 08-9542, 2009 WL 806752, at *2 (10th Cir. Mar. 30, 2009) (unpublished); *Diego Pedro v. U.S. Att'y Gen.*, No. 08-15978, 2009 WL 1101373, at *2 (11th Cir. Apr. 24, 2009) (unpublished per curiam).

Section 1252(a)(2)(D) and limited the term "questions of law" to "pure" legal claims or narrow questions of "statutory construction." *See Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); App. 13a-15a (decision in this case) (stating that Section 1252(a)(2)(D) does not cover "mixed" questions); *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regarding statutory construction'" under Section 1252(a)(2)(D)) (citation omitted).[7]

Second, the courts of appeals are also sharply divided on how to identify a reviewable mixed question of law and fact. Thus, even among those circuits that agree that a mixed question is generally reviewable under Section 1252(a)(2)(D), there is sharp disagreement on whether particular claims present such reviewable mixed questions (as opposed to pure factual or discretionary claims).

Indeed, the eleven circuits to address the jurisdictional question at issue here have adopted no fewer than five different analytical positions: (1) the Ninth Circuit in *Ramadan*, 479 F.3d 646, has held

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[7] The First and Fifth Circuits have not yet weighed in on whether the application of law to fact is generally reviewable under Section 1252(a)(2)(D).

that the type of claim presented by Mr. Khan is reviewable as a mixed question of law and fact; (2) some courts (the First, Fifth, and Sixth) have held that it is an unreviewable *factual* claim;[8] (3) some courts (the Third and Tenth) have held that it is an unreviewable *discretionary* claim;[9] (4) some (the Fourth, Seventh, and Eighth) have concluded that the claim is unreviewable because it is *both* factual and discretionary;[10] and (5) the Second Circuit in *Chen*, 471 F.3d at 329, has stated that it will proceed on a case-by-case basis.[11]

In short, the courts of appeals have reached conflicting results on the basis of widely divergent analytical approaches. Moreover, these analytical differences have now been entrenched for several years.

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[8] *See Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005); *Zhu v. Gonzales*, 493 F.3d 538, 596 & n.31 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

[9] *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006).

[10] *See* App. 14a (decision in this case); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed* (Aug. 11, 2009 (No. 09-194); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. 2009); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

[11] The Eleventh Circuit has not provided any rationale. *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

3. The conflicting jurisdictional positions and analytical approaches of the courts of appeals have broad implications beyond asylum, and have led to jurisdictional circuit splits in a variety of other substantive immigration areas. As in the asylum filing context, the courts of appeals are divided on three basic issues: (a) whether the term "questions of law" in Section 1252(a)(2)(D) encompasses both pure legal claims and mixed questions of law and fact; (b) the proper analytical framework for distinguishing between pure factual claims and mixed questions of law and fact; (c) the proper analytical framework for differentiating between discretionary and non-discretionary claims.

(a) The division between the courts of appeals over whether Section 1252(a)(2)(D) encompasses mixed questions of law and fact has created splits in contexts other than asylum. For example, an alien's statutory eligibility for a waiver of removal generates significant immigration litigation, especially given the frequency with which Congress amends the waiver provisions. *See, e.g., St. Cyr*, 533 U.S. at 314-26 (resolving dispute over retroactive application of the 1996 amendments to the Section 212(c) waiver, similar to the current "cancellation" waiver). Given the fact that the courts of appeals have taken divergent positions on the scope of Section 1252(a)(2)(D), this waiver litigation has now generated jurisdictional conflicts.

The Seventh Circuit, for example, has held that it has limited review over claims relating to

certain waivers in light of its position that Section 1252(a)(2)(D) encompasses only "pure" questions of law. Thus, in a case involving the legal eligibility standards for cancellation of removal, the Seventh Circuit found that Section 1252(a)(2)(D) did not encompass review "of the *application* of the 'continuous physical presence' standard to the facts of the case." *Cevilla*, 446 F.3d at 661 (emphasis in original).

The Fourth Circuit has taken the opposite position. In *Jean*, 435 F.3d at 482, for instance, the Fourth Circuit held that it could review whether the alien in that case had satisfied the statutory eligibility criteria for cancellation of removal, stating that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act. *Cf. Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008) (finding jurisdiction to "review the nondiscretionary determinations underlying a denial of an application for cancellation of removal, such as the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility") (internal quotation marks and citation omitted).

(b) The courts of appeals are similarly split on how to distinguish a mixed question of law and fact from a purely factual claim. In *Hamid v. Gonzales*, for instance, the Seventh Circuit held that it lacked jurisdiction to review whether, on the facts of the case, petitioner satisfied the legal standard for relief

under the Convention Against Torture (CAT). 417 F.3d 642, 647 (7th Cir. 2005). *See also, e.g., Lovan v. Holder*, --- F.3d ---, 2009 WL 2341822, at *7 (8th Cir. July 31, 2009) (holding that application of the CAT standard to undisputed facts is "nothing more than a challenge to the agency's factual determinations"); *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) ("we may not review the administrative fact findings of the IJ or the BIA as to . . . the likelihood that the alien will be tortured if returned to the country in question").

In contrast, the Third Circuit views such claims as reviewable mixed questions of law and fact under Section 1252(a)(2)(D), because they involve the agency's application of the CAT legal standard to undisputed facts. *See Toussaint*, 455 F.3d at 412 n.3 ("The question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that he will be subject to persecution or torture upon removal to Haiti."); *Awuku v. Att'y Gen.*, No. 08-4778, 2009 WL 1741500, at *1-2 (3d Cir. June 22, 2009) (unpublished) (citing *Toussaint* and stating that the government "is wrong in its repeated assertion that '[t]his Court lacks jurisdiction over any challenge to the finding that [Awuku] failed to establish eligibility for CAT protection,'" rejecting the argument that such a claim involves only a "'factual determination'") (quoting the government's brief).

(c) The courts of appeals are also divided in various contexts on how to distinguish between

discretionary and non-discretionary claims. For example, the courts of appeals disagree on whether the "particularly serious crime" determination governing eligibility for withholding of removal is discretionary and therefore unreviewable. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable), *and Lovan*, 2009 WL 2341822, at *6 (same), *with Alaka v. Att'y Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed), *and Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

The courts are likewise divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is discretionary and therefore unreviewable,[12] and on the nature of visa revocation determinations governed by 8 U.S.C. 1155.[13]

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[12] *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is inherently discretionary and unreviewable because it requires "a judgment call"), *and Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves the "application of law to factual determinations").

[13] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that visa revocations are not "purely subjective" because good and sufficient cause is a "meaningful standard"), *with Jilin Pharmaceutical USA, Inc. v. Gonzales*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the

Thus, the conflicting results and analytical approaches taken by the courts of appeals in the asylum context have broad significance, providing an additional reason for this court to ensure uniformity. Indeed, the jurisdictional issues that arise in the asylum filing context cut across a wide swath of immigration law.

B. The Seventh Circuit's Ruling Is Incorrect.

The Seventh Circuit's view that Section 1252(a)(2)(D) encompasses only pure questions of law is incorrect as a matter of statutory interpretation and constitutional mandate. The reference to "questions of law" in Section 1252(a)(2)(D) applies to both pure legal claims as well as the application of law to fact. Moreover, the application of the statutory filing exceptions to the underlying facts of a case raises a mixed question of law and fact, and not an unreviewable factual claim. The statutory filing exceptions are also not discretionary.

1. Six of the nine circuits to address the issue have correctly held that the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to established facts. Indeed, the 2005 REAL

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statute states that the Attorney General "may" revoke a visa "at any time" the decision is discretionary), *and El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (finding that "the discretionary nature of the decision is apparent from the plain language of the statute").

ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). In fact, the Report expressly contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review, but simply restores such review to its former settled forum prior to 1996." *Id.* *See Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review. . . ."); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

Habeas review has traditionally included claims involving both the proper interpretation of statutes *and* their application. In *St. Cyr*, this Court reviewed the history of habeas law and found that there was review of both the "application [and] interpretation of statutes." 533 U.S. at 302. More recently, the Court stated emphatically that it viewed as "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application* or interpretation' of relevant law." *Boumediene*, 128 S.

Ct. at 2266 (emphasis added) (quoting *St. Cyr*, 533 U.S. at 302).

Further, in both *Boumediene* and *St. Cyr*, the Court stressed that habeas review has been at its most robust in cases involving executive detention (as opposed to the criminal context where there has been prior judicial review). *Boumediene*, 128 S. Ct. at 2266-69; *St. Cyr*, 533 U.S. at 301-03.

Following this Court's historical analysis, the courts of appeals have likewise noted that habeas review has always encompassed claims involving the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on history of habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the "application" of statutes and regulations was traditionally reviewable in habeas); *Kamara*, 420 F.3d at 213-15 (same).

Notwithstanding this history, the Seventh Circuit in this case relied on the statement in the REAL ID Act's Conference Report that the "purpose of [Section 1252(a)(2)(D)] . . . is to permit judicial review over those issues that were historically reviewable on habeas – constitutional and statutory-construction questions, not discretionary or factual questions." App. 13a (quoting Report). But that passage is not an exhaustive recitation of *all* legal claims that were reviewable in habeas. The Report is simply distinguishing legal claims from "factual"

and "discretionary" claims. If the passage were read to be exhaustive, then the REAL ID Act would preclude review even over *pure* questions of law regarding the proper interpretation of *regulations*. That would directly contradict this Court's precedent and render the statute unconstitutional. *See St. Cyr*, 533 U.S. at 307 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), for the proposition that habeas review encompasses claims involving the proper interpretation and application of regulations). *See also Ramadan*, 479 F.3d at 653-54; *Chen*, 471 F.3d at 327-30.[14]

In sum, given the constitutional concerns that would be triggered, and Congress' clear intent to preserve the traditional scope of habeas review, there is no basis for construing the reference to

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[14] In its discussion of legislative history, the Seventh Circuit acknowledged that the term "pure" had originally modified the term "questions of law" in an earlier version of the bill but was later deleted. App. 13a. As a result, the provision Congress ultimately enacted as 8 U.S.C. 1252(a)(2)(D) applies, by its terms, to all "questions of law." The Seventh Circuit dismissed the deletion's significance, however, citing to the Conference Report's statement that the qualifier "pure" was deleted from the final bill because it was viewed as superfluous. App. 13a. But, as the Second and Ninth Circuits have explained, the deletion of the term "pure" simply reinforced the Conference Report's observation that courts could review only the "legal elements" of "mixed questions of law and fact." H.R. Rep. No. 109-72, 175 (2005); *Chen*, 471 F.3d at 325-26 (noting the Conference Report's explanation for the deletion of the word "pure" before "questions of law" but rejecting the contention that Section 1252(a)(2)(D) does not encompass the application of law to fact); *Ramadan*, 479 F.3d at 653-54.

"questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*, 533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to provide review over the alien's retroactivity claim, emphasizing that this interpretation avoided the "serious" Suspension Clause issues that would have been triggered by precluding all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-41 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

2. Furthermore, the application of the asylum filing exceptions to the underlying facts of a case raises a reviewable mixed question of law and fact, and not a factual claim. A mixed question of law and fact is one where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the

> rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Significantly, with the exception of the Ninth Circuit in *Ramadan*, 479 F.3d at 648, the courts of appeals have ignored this Court's decisions differentiating between historical facts and mixed questions of law and fact. *See, e.g.*, App. 3a (decision in this case); *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

In this case, the immigration judge made a determination that the established facts (including Mr. Khan's post-traumatic symptoms) did not constitute "extraordinary circumstances." The judge

thus applied the statutory standards to the historical facts of the case. That is a mixed question of law and fact. *Ornelas*, 517 U.S. at 696-97.[15]

Review of the filing exceptions is essential to ensure that those provisions are interpreted in a manner consistent with congressional intent. As this Court has noted, judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself, particularly in contexts where, as here, a substantive standard is given concrete meaning through case-by-case adjudication. Without such review, an agency could effectively eviscerate a statutory standard by consistently announcing the correct legal rule but de facto applying a standard that is more stringent than the one formally announced. *See, e.g.*, *Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas*, 517 U.S. at 697 (explaining that "the legal

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[15] The Seventh Circuit noted that the *immigration judge* in this case made factual findings on a number of issues. The court thus stated that this case did not involve the application of the law to "undisputed" facts. The relevant question, however, is whether petitioner challenged those underlying facts in the *court of appeals*, or instead, accepted the agency's factual determinations and argued only that, on those facts, he satisfied the legal standards. Insofar as the Seventh Circuit was suggesting that this case did not present a mixed question of law and fact because petitioner raised factual issues before the *immigration judge*, the court of appeals' erroneous understanding of what constitutes a mixed question just reinforces the degree to which there is significant analytical confusion surrounding the jurisdictional issues here.

rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

3. Finally, the asylum filing exceptions are not discretionary. As the Ninth Circuit noted in *Ramadan*, 479 F.3d at 655-56, the phrase "to the satisfaction" could not have been intended to signal that the Attorney General has unreviewable discretion because that would render those words redundant in other contexts. Congress included the phrase "to the satisfaction" in other provisions of the INA where it *also* expressly stated that the "Attorney General has sole discretion." *See Ramadan*, 479 F.3d at 655-56 (citing as examples 8 U.S.C. 1182(h)(1)(A) and 8 U.S.C. 1182(a)(9)(B)(v)). Thus, the words "to the satisfaction of the Attorney General" were not intended to vest the Attorney General with unreviewable discretion over the "changed" or "extraordinary" circumstances determination, but rather provide an objective standard of proof.

Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective standard of proof. *See* Asylum Officer Basic Training Course – One-Year Filing Deadline 21 (Mar. 23, 2009), *available at* http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf ("The standard of proof to establish changed or extraordinary circumstances is proof to *the satisfaction of the Attorney General.* This is a

lower standard of proof than the 'clear and convincing' standard that is required to establish that the applicant timely filed.") (emphasis in original). The controlling regulations also make clear that the words "to the satisfaction of the Attorney General" should be understood as an objective *standard of proof*. *See* 8 C.F.R. 1208.4(a)(2); 1208.4(a)(5) (formerly at 208.4). Accordingly, the changed and extraordinary circumstances exceptions are not discretionary.

Moreover, the application of the statutory filing exceptions to the facts of a case is not the kind of determination that is inherently discretionary. *See Ramadan,* 479 F.3d at 656 (review of the statutory filing exceptions does not call for a discretionary "subjective" determination). As this Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g., St. Cyr*, 533 U.S. at 307-08 (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental

processes, rather than other more objective factors, to provide the standard").

When the BIA determines that an alien has demonstrated changed or extraordinary circumstances it does not simply exercise its conscience or permit filing as an act of grace. Rather, it applies a statutory standard, fleshed out by agency regulations. The circuits that have held that the application of these standards is discretionary have done so in conclusory opinions that do not address the Ninth Circuit's analysis of the statutory structure or this Court's decisions regarding the nature of discretion. *See, e.g.*, *Sukwanputra*, 434 F.3d at 635; *Vasile*, 417 F.3d at 768; *Ignatova*, 430 F.3d at 1214; *Ferry*, 457 F.3d at 1130.

* * *

In short, Section 1252(a)(2)(D) generally covers the application of law to fact, as six circuits have properly concluded. The Seventh Circuit also erred in finding that the type of claim raised by Mr. Khan is discretionary and factual, rather than one involving the application of law to fact.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT JURISDICTIONAL ISSUE PRESENTED HERE.

According to a computerized search, there have been more than 1,000 cases citing to Section 1252(a)(2)(D) since its enactment in 2005. Hundreds of these cases involve the asylum filing deadlines. Given the overall number of decisions involving Section 1252(a)(2)(D), and the enormous stakes at issue in asylum cases, this Court's review is warranted to ensure uniformity. Moreover, this case is a suitable vehicle to resolve the conflict; the jurisdictional issue was outcome-determinative and was squarely addressed by the Seventh Circuit. Nor is there any impediment that would prevent the Court from reaching the issue.

In sum, there is an entrenched circuit split on the question of the courts of appeals' jurisdiction to review the statutory exceptions to the asylum filing deadline, and Mr. Khan's case will permit the court to fully resolve it. This Court's review is thus warranted. An asylum applicant's opportunity to avoid persecution should not depend on the circuit in which he happens to find himself. That is especially true where the issue dividing the circuits is one involving the jurisdiction of the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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August 2009

APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2009

Before

WILLIAM J. BAUER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

Nos. 06-3966 & 07-2252

ABDUL H. KHAN,
YASMEEN HASEEB,
SARA HASEEB,
and SANA HASEEB,

Petitioners,

v.

ERIC H. HOLDER JR.,
Attorney General,

Respondent.

Petitions for Review of Orders of the Board of Immigration Appeals.

Nos. A96-494-318,
A96-494-319,
A96-494-320 &
A96-494-321

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service* has requested a vote on the petition for rehearing en banc, and both of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petitions for rehearing and for rehearing en banc are DENIED.

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* The Hon. Joel M. Flaum did not participate in the consideration of this petition for rehearing en banc.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 06-3966 & 07-2252

ABDUL H. KHAN, YASMEEN HASEEB,
SARAH HASEEB, and SANA HASEEB,

Petitioners,

v.

MARK FILIP, Acting Attorney General
of the United States,

Respondent.

Petitions for Review of Orders of
the Board of Immigration Appeals.
Nos. A96-494-318, A96-494-319, A96-494-320
& A96-494-321

ARGUED JANUARY 18, 2008—DECIDED JANUARY 29, 2009

Before BAUER and SYKES, *Circuit Judges.*[*]

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[*] Circuit Judge Ann Claire Williams recused herself after oral argument and has not participated in deciding this appeal. This decision is being issued by a quorum of the panel. *See* 28 U.S.C. § 46(d).

SYKES, *Circuit Judge*. Abdul Khan is a native and citizen of Pakistan who entered the United States with his family in 1998. They remained here after their visitors' visas expired, and in 2003 Khan applied for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). His family members are derivative applicants. An Immigration Judge ("IJ") heard the claims and denied relief, concluding that Khan's asylum application was untimely and the delay was not excused by extraordinary circumstances; that Khan failed to show he had suffered politically motivated persecution in Pakistan; and that Khan had failed to show a clear probability that he would be persecuted or tortured if he returned to Pakistan.

The Board of Immigration Appeals ("BIA") affirmed. Khan then moved to reopen, presenting what he characterized as new evidence about his physical and mental condition that he claimed undermined the IJ's decisions. The BIA declined to reopen the case. Khan asks us to review each of these decisions.

We dismiss in part and deny in part the petitions for review. Under 8 U.S.C. § 1158(a)(3), we lack jurisdiction to review the BIA's determinations that Khan's asylum claim was untimely and the delay was not excused by extraordinary circumstances. The REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(ii), 119 Stat. 231, 310-11, permits judicial review of constitutional claims or questions of law; Khan's challenges to the

immigration agency's timeliness and "extraordinary circumstances" determinations address only factual and discretionary issues and therefore lie outside our review jurisdiction. *See Vasile v. Gonzales*, 417 F.3d 766 (7th Cir. 2005). We also conclude that substantial evidence supports the agency's denial of withholding of removal and protection against removal under the CAT. Finally, to the extent we have jurisdiction to review the denial of Khan's motion to reopen, we conclude that the BIA did not abuse its discretion in determining that Khan's "new evidence" was neither new nor material.

I. Background

Khan is a Mohajir, a term used to describe Pakistanis of Indian descent. Because Mohajirs faced difficulties competing with other Pakistanis for jobs and political influence, some Mohajirs joined the Mohajir Quami Movement ("MQM"), an organization ostensibly devoted to expanding the influence of its members. Khan joined the MQM in 1985 and assumed an active role in the organization; he assisted the party by distributing flyers, making speeches, transporting voters to polls, raising funds, and displaying political signs.

Beginning in the early 1990s, some elements of the MQM began turning to violence as a means of achieving the organization's goals. Khan's brother, a former MQM member, was beaten by the organization when he refused to follow MQM orders

to kidnap a political opponent; he later fled to England. The MQM's violent turn and the mistreatment of his brother prompted Khan to resign from the organization; he told MQM members he needed to care for his ill father. Nevertheless, Khan continued to provide monthly financial support to the MQM.

Khan first came to the United States in June 1995 after the Pakistani government falsely arrested him and detained him for nearly two days.[1] Khan returned to Pakistan 17 days later when he learned his father had suffered a heart attack. Upon his return, MQM members began harassing him. For example, when Khan explained that he needed to care for his ailing father, an MQM member threatened to kill Khan's father. Later, in December 1997, Khan and his family were carjacked by men Khan said he recognized as MQM members. Khan was warned not to report the crime to the police, but he did so anyway.

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[1] The Pakistani government had begun cracking down on MQM violence and mistakenly arrested Khan, thinking he was his brother (though there is no evidence his brother was implicated in MQM violence). Khan was beaten and kicked during his two-day detention, and was released only after his family paid a bribe. Khan's present claims, however, are not premised on this incident; he does not argue that the Pakistani government will subject him to persecution if he is removed to his native country. His claims for relief from removal are instead based on the abuse he fears from the MQM.

The cumulative impact of these events prompted Khan to make arrangements to leave Pakistan. He quit his job in December 1997 and came to the United States by himself in February 1998 to prepare for his family's relocation. However, Khan returned to Pakistan in March 1998 because his youngest daughter was ill. Back in Pakistan, Khan asked police about the progress of the investigation into his stolen car. He believes MQM members saw him go to the police, and in May Khan was abducted by the MQM and held for nearly three days. During his detention, his captors accused him of reporting their activities to the police, severely beat him and threatened to kill him, and warned him never to speak to the police again. For emphasis, they showed him a box containing severed fingers. Khan's family notified authorities about his abduction, but Khan never filed a complaint about the kidnapping with the police or reported it to the medical personnel who treated his injuries after his release.

This incident finally convinced Khan to move his family to the United States. Khan entered this country in June 1998 with his wife and two daughters, and they overstayed their visitors' visas. Khan had little trouble obtaining numerous jobs, renting an apartment, and supporting his family. But Khan's friends noticed that his experiences in Pakistan caused him to develop symptoms of depression, avoid social contact, and have difficulty making decisions.

One of Khan's friends urged him to apply for asylum based on his mistreatment by the MQM, but Khan waited several years to pursue that option. In June 2002 the Attorney General announced the National Security Entry-Exit Registration System, which required aliens from certain countries (including Pakistan) to register with immigration officials. *See* Registration and Monitoring of Certain Non-Immigrants, 67 Fed. Reg. 52,584-601 (Aug. 12, 2002). This development prompted Khan to apply for asylum, and in March 2003 (several months before he was required to register and nearly five years after arriving in the United States) he submitted an application for asylum, withholding of removal, and protection against removal under the CAT.

In May 2005 an IJ denied all of Khan's applications. The asylum claim had been filed well beyond the one-year time limit established by 8 U.S.C. § 1158(a)(2)(B), and the IJ rejected it as untimely. Khan asserted that he did not know about the one-year deadline and that his poor mental health—his depression and fear of being returned to Pakistan—compromised his ability to timely file for asylum. He argued that these were the sort of "extraordinary circumstances" that should excuse the late filing under 8 U.S.C. § 1158(a)(2)(D), but the IJ disagreed. Turning to Khan's withholding-of-removal claim, the IJ questioned the credibility of certain aspects of Khan's testimony but nonetheless accepted it; the IJ held that the attacks were not sufficiently severe to be considered persecution and were not motivated by Khan's political beliefs. The

IJ also rejected Khan's claim of an objectively reasonable fear of future persecution. Finally, the IJ concluded that Khan had not shown it was more likely than not that he would be tortured if he were removed to Pakistan. Accordingly, the IJ entered an order of removal. The BIA adopted and affirmed the IJ's decision, and Khan filed a petition for review.

While Khan's petition for review was still in the briefing stage, he asked the BIA to reopen his removal proceeding based on what he claimed was new evidence—affidavits with additional mental health reports—supporting his allegation that his mental anguish should excuse his untimely asylum application. Khan also argued that the reports addressed the IJ's skepticism about the credibility of certain aspects of his testimony. The BIA denied the motion to reopen, holding that the "new evidence" was merely repetitious and did not provide a basis for upsetting the IJ's determinations. The BIA noted that the IJ had accepted Khan's testimony about the assaults and the medical reports did not undermine the IJ's alternative conclusion that the attacks were not motivated by political opinion. Khan filed a petition for review of this decision as well, and we ordered the petitions consolidated.

II. Discussion

A. Asylum claim

Khan first challenges the immigration agency's failure to reach the merits of his asylum

claim. The IJ dismissed Khan's asylum application because it was not filed within a year after Khan arrived in the United States as required by 8 U.S.C. § 1158(a)(2)(B). The IJ had the discretion to ignore this deadline if Khan established that his delay was due to "extraordinary circumstances," *id.* § 1158(a)(2)(D), but the IJ did not think Khan presented sufficiently compelling circumstances to excuse his nearly five-year delay. The BIA affirmed. Khan challenges the agency's determination that he lacked "extraordinary circumstances" for the untimely filing, arguing that the IJ did not give appropriate weight to the evidence showing Khan suffered from a serious mental disability because of his mistreatment while in Pakistan.

The problem for Khan is that we lack jurisdiction to review the IJ's timeliness determination. Under 8 U.S.C. § 1158(a)(3), we have no jurisdiction to review any decision the agency makes under § 1158(a)(2), including decisions relating to whether the applicant has demonstrated "extraordinary circumstances" excusing a delay in filing an asylum application. The REAL ID Act of 2005 preserved our jurisdiction to review "constitutional claims" or "questions of law." *See* 8 U.S.C. § 1252(a)(2)(D). But as we explained in *Vasile v. Gonzales*, 417 F.3d 766, factual determinations (such as whether the asylum application was filed within the one-year deadline) and discretionary decisions (such as whether the alien has demonstrated "extraordinary circumstances" justifying the delay) do not fall within the exception

to the jurisdictional bar for constitutional claims or questions of law under § 1252(a)(2)(D). *See id.* at 768-79.

Khan urges us to reconsider our holding in *Vasile*. He argues that *Vasile*, which discussed the question-of-law exception created by the REAL ID Act, gave insufficient attention to the legislative history of the Act. A closer look at that legislative history, Khan claims, demonstrates that Congress intended the term "questions of law" to encompass not only questions of statutory interpretation but also questions concerning the application of law to a set of facts—or mixed questions of law and fact.

We decline Khan's invitation to revisit *Vasile*. Section 1158(a)(2)(D) provides: "An application for asylum of an alien *may* be considered . . . if the alien demonstrates *to the satisfaction* of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within [the one-year period]." (Emphasis added.) The terms "may" and "to the satisfaction of" strongly indicate that decisions under § 1158(a)(2)(D) are, as we said in *Vasile*, "inherently discretionary" and not reviewable. 417 F.3d at 768. Every circuit to consider this issue save one has agreed with our interpretation.[2]

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[2] *See, e.g., Zhu v. Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. (continued...)

(...continued)
2007) (noting that federal appellate courts lack jurisdiction "to review timeliness determinations that are based on an assessment of the facts and circumstances of a particular case"); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006) ("This petitioner's challenge is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised."); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (holding that a petitioner's argument that a pending adjustment-of-status application excused his untimely asylum application "is a challenge to an exercise of discretion that remains outside our scope of review"); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (amending *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003), a case cited in *Vasile*, to clarify that courts lack jurisdiction to review "asylum applications denied for untimeliness only when the appeal seeks review of discretionary or factual questions" and declining to exercise jurisdiction over a claim that the IJ incorrectly applied the "changed circumstances" provision); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (finding that a claim that the petitioners showed changed circumstances or extraordinary circumstances was discretionary); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (finding that the presence of changed circumstances "is a discretionary judgment of the Attorney General"); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) ("The timeliness of an asylum application is not a constitutional claim or a question of law covered by the Real ID Act's changes.").

As far as we can tell, only the Ninth Circuit has concluded that the inquiry contemplated by § 1158(a)(2)(D) is not a discretionary one. *See Ramadan v. Gonzales*, 479 F.3d 646, 656 (9th Cir. 2007). However, we are not persuaded by its reasoning. As we just noted, seven other circuits agree with our interpretation, and the Ninth Circuit's refusal to rehear *Ramadan* en banc prompted a strongly worded dissent from

(continued...)

Far from supporting Khan's interpretation, the legislative history accompanying the REAL ID Act confirms our reading of the statute. *See* H. REP. 109-72, at 174-76 (2005). The House Conference Report discussing the REAL ID Act describes what the term "questions of law" meant in the statutory provision that would become § 1252(a)(2)(D). The report indicates that although Congress had considered adding the word "pure" before "questions of law," the modifier was left out because it was understood that "a 'question of law' is a question regarding the construction of a statute" and therefore "[t]he word 'pure' adds no meaning." H. REP. 109-72, at 175. The report also explains that this provision was designed "to permit judicial review over those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not discretionary or factual questions." *Id.*

Khan suggests nonetheless that Congress was trying to incorporate more than constitutional and statutory-interpretation questions into the phrase "questions of law." Accepting that Congress wanted to maintain judicial review of claims "historically reviewable on habeas," Khan seizes upon language from *INS v. St. Cyr*, 533 U.S. 289 (2001), stating that habeas relief was traditionally available for "detentions based on errors of law, including the

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(...continued)
nine judges, *see Ramadan v. Keisler*, 504 F.3d 973 (9th Cir. 2007) (O'Scannlain, J., dissenting from denial of rehearing en banc).

erroneous *application* or interpretation of statutes." *Id.* at 302 (emphasis added). The legislative history does suggest that Congress drew on *St. Cyr* when adopting the provision that would become § 1252(a)(2)(D), but not for the point Khan makes. The conference report indicates Congress sought to address the Supreme Court's concern in *St. Cyr* that the elimination of judicial review over legal issues would raise serious constitutional problems; there is nothing to suggest, however, that the phrase "questions of law" as that term is used in § 1252(a)(2)(D) includes mixed questions of law and fact. To the contrary, the conference report mentions so-called mixed questions of law and fact as follows: "When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements." H. REP. 109-72, at 175.

We acknowledge that the line between legal questions—which we can review—and discretionary or factual determinations—which we cannot—is occasionally difficult to draw. In many cases, such as this one, we can determine our lack of jurisdiction fairly readily because it is clear we are being asked to review either factual determinations or the manner in which the agency weighed the various factors that inform the exercise of its discretion. *See, e.g., Ogayonne v. Mukasey*, 530 F.3d 514, 519 (7th Cir. 2008); *accord Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 332 (2d Cir. 2006). Some discretionary determinations do present underlying, reviewable questions of law, such as those in which

the agency is alleged to have applied the wrong legal standard. *See Tariq v. Keisler*, 505 F.3d 650, 656 (7th Cir. 2007) (recognizing that we retain jurisdiction to determine whether the IJ erred in requiring "exceptional circumstances" instead of "extraordinary circumstances"). But the jurisdictional bar cannot be overcome by trying to "shoehorn" a factual or discretionary determination "into the 'question of law' category" or claiming that a question of law exists simply because the agency failed to "apply the law," as Khan does here.[3] *Vasile*, 417 F.3d at 768; *see also Chen*, 471 F.3d at 329-30 ("[W]hen analysis of the arguments raised by the petition for judicial review reveals that they do not in fact raise any reviewable issues, the petitioner cannot overcome this deficiency and secure review by using the rhetoric of a 'constitutional claim' or 'question of law' to disguise what is essentially a quarrel about fact-finding or the exercise of discretion.").

Because Khan presents a challenge that "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was

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[3] Khan identifies what he thinks are purely legal errors stemming from erroneous interpretations of 8 C.F.R. § 1208.4(a)(5). This regulation addresses situations in which an IJ may excuse the failure to file a timely asylum application based on "extraordinary circumstances." Khan argues that the IJ required him to provide more evidence excusing his delay than is called for by the regulations. This is an argument about the sufficiency of the evidence, not the interpretation of the regulation.

exercised," we lack jurisdiction to review it.[4] *Chen*, 471 F.3d at 332 (dismissing for lack of jurisdiction a similar challenge to an untimeliness determination). Khan's claim that his mental anguish constituted an "extraordinary circumstance" preventing him from filing a timely asylum application raises no legal issue; it is, instead, a quintessentially factual and

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[4] Anticipating this result, Khan argues that our holding creates serious constitutional problems. The REAL ID Act replaced the system of challenging deportation orders via habeas approved in *INS v. St. Cyr*, 533 U.S. 289, with a system that permits federal appellate courts to review constitutional claims and questions of law on petitions for review from the immigration agency. *See* H. REP. 109-72, at 175. Drawing again on language from *St. Cyr*, Khan argues that the traditional scope of habeas allowed challenges to "detentions based on errors of law, including the erroneous *application* or interpretation of statutes." *St. Cyr.*, 533 U.S. at 302 (emphasis added). This statement was part of a broader commentary by the Court that the only method through which an alien could challenge a deportation order until the 1950s was a habeas petition. Khan argues that if we lack jurisdiction to review mixed questions of law and fact, § 1252(a)(2)(D) is not an adequate substitute for habeas.

We think Khan mischaracterizes this aspect of *St. Cyr*. The Court expressed concern that any action by Congress that would "entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions," *id.* at 300; the Court did not suggest that the inability to review mixed questions of law and fact would raise constitutional concerns. The concern about judicial review of purely legal questions has been alleviated by § 1252(a)(2)(D), which authorizes review of constitutional claims and questions of law.

discretionary issue.[5] *See, e.g., Ogayonne*, 530 F.3d at 519; *Zeqiri v. Mukasey*, 529 F.3d 364, 369 (7th Cir. 2008); *Pavlyk v. Gonzales*, 469 F.3d 1082, 1086-87 (7th Cir. 2006); *Sokolov v. Gonzales*, 442 F.3d 566, 568-69 (7th Cir. 2006); *Vasile*, 417 F.3d at 768-69.

B. Withholding-of-removal and CAT claims

There is no jurisdictional bar preventing us from reviewing the IJ's decision to reject Khan's withholding-of-removal and CAT claims. Where the BIA affirms and adopts the decision of the IJ, as it did in this case, we review the IJ's decision as

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[5] Khan thinks this case falls into an exception recognized by some of our sister circuits to permit review of the agency's application of law to facts if the facts are undisputed. *See Liu v. INS*, 508 F.3d 716, 722 (2d Cir. 2007) (recognizing the possibility of exercising jurisdiction over discretionary decisions based on "unambiguous mischaracterizations" of the record, such as when an IJ states that his decision is based on a lack of testimony on a topic yet the record unambiguously reveals the existence of such testimony); *cf. Ramadan v. Gonzales*, 479 F.3d 646, 657 (9th Cir. 2007) (noting that the factual basis of the petition was undisputed and proceeding to determine whether the facts constitute "changed circumstances"). We take no position on this exception; this is not a case of undisputed facts. Khan offered multiple factual bases for excusing his late application ranging from his purported ignorance of the statutory deadline to the difficulties posed by his mental problems. The IJ had to evaluate the evidence and testimony and make factual findings (such as determining whether Khan was in fact ignorant of the deadline and determining the severity of Khan's mental problems).

supplemented by the BIA. *BinRashed v. Gonzales*, 502 F.3d 666, 670 (7th Cir. 2007). Our examination of the agency's decision is limited to determining whether its conclusion is supported by substantial evidence. *Sankoh v. Mukasey*, 539 F.3d 456, 468 (7th Cir. 2008). Under this extremely deferential standard, we will uphold the agency's decision if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *BinRashed*, 502 F.3d at 670 (internal quotation marks omitted). Reversal is warranted only if "the evidence *compels* a different result," and we will not overturn the agency's findings just because we might have reached a different conclusion. *Balogun v. Ashcroft*, 374 F.3d 492, 498 (7th Cir. 2004).

An alien is entitled to withholding of removal under the INA if he can show a "clear probability" that his "life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); *Aung v. Gonzales*, 495 F.3d 742, 746 (7th Cir. 2007). Similarly, an alien is entitled to protection against removal under the CAT if he can show it is "more likely than not" that he will be tortured if removed. *Aung*, 495 F.3d at 747. Although these standards are the same, both impose a more stringent test than the "well-founded fear" standard employed in asylum cases. *See Firmansjah v. Gonzales*, 424 F.3d 598, 605 (7th Cir. 2005).

There are two ways that an alien can show he is entitled to withholding of removal. First, he can show that he was subject to past persecution, which triggers a rebuttable presumption of future persecution. *See* 8 C.F.R. § 1208.16(b)(1); *Irasoc v. Mukasey*, 522 F.3d 727, 729-30 (7th Cir. 2008). Second, in the absence of any evidence of past persecution, an alien can show that it is more likely than not that he will suffer future persecution if removed. *See* 8 C.F.R. § 1208.16(b)(2); *BinRashed*, 502 F.3d at 671. We have said that persecution entails "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993). And while persecution can be established from a single particularly vicious incident, *see Dandan v. Ashcroft*, 339 F.3d 567, 573 (7th Cir. 2003), not every example of mistreatment rises to the level of persecution, *see Nakibuka v. Gonzales*, 421 F.3d 473, 476 (7th Cir. 2005) ("An asylum applicant need not show that her life or freedom were threatened, but the harm she suffered must rise above the level of 'mere harassment' and must result from more than unpleasant or even dangerous conditions in her home country.").

The IJ rejected Khan's past-persecution arguments, concluding that the attacks Khan suffered at the hands of the MQM did not amount to persecution and that Khan failed to establish that his attackers were motivated by his political beliefs. Whether substantial evidence supports the first

conclusion is a close question, but we need not address it; the record does not compel a contrary result as to the second conclusion, and the agency's rejection of Khan's claim of past persecution can be sustained on this basis alone. To be considered persecution, an alien's mistreatment must be "because of the alien's . . . political opinion." 8 U.S.C. § 1231(b)(3)(A). Khan testified that he quit the MQM and stopped contributing money to the organization because he disagreed with its violent tactics. He argues that the chain of events culminating in his kidnapping compels the conclusion that he was targeted because of his political beliefs.

Substantial evidence supports the IJ's opposite conclusion, however. Khan testified that the MQM extorted money and property from Pakistanis indiscriminately, which undermines his argument that he was targeted for his opposition to MQM's violent actions. The record suggests that the MQM was motivated more by financial gain rather than political philosophy. The MQM demanded payment from every person in Khan's neighborhood, including those who had never joined the organization, and MQM members began assaulting Khan only after he stopped his payments and approached the police—not when he left the organization.[6] Furthermore, the

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[6] In an unpublished order, we previously refused to find political persecution when the MQM extorted money from all neighboring businesses. *See Rehman v. Keisler*, 252 F. App'x

(...continued)

apparent goal of Khan's kidnapping was to deter him from contacting the police regarding the carjacking. The evidence indicates that the MQM wanted to avoid criminal prosecution of its members for their carjacking and kidnapping activities—a conclusion confirmed by Khan's testimony that police had launched an effort to crack down on the organization's violent actions—rather than to punish Khan for his political opinion. *See, e.g., Doe v. Gonzales*, 484 F.3d 445, 447-48 (7th Cir. 2007) (homicides motivated solely by a desire to eliminate witnesses to a crime were not on account of protected ground).

Despite his failure to establish past persecution, Khan can still demonstrate he is entitled to withholding of removal if he shows that it is more likely than not that he would suffer persecution upon his return to Pakistan. However, the IJ rejected Khan's arguments, and the record does not compel a contrary conclusion. Khan claims he fears returning to Pakistan because the MQM has a policy of attacking those who inform police about its activities. Yet Khan has not lived in Pakistan since 1998, and it is hard to see how the MQM could think he has any information of value to provide the police at this point. We doubt that police are still investigating a carjacking that is more than a decade

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(...continued)
752, 754 (7th Cir. 2007) ("[A]n alien's refusal to cooperate with a political party does not, without more, compel a conclusion of political persecution.").

old—or more importantly, that the MQM still remembers Khan's decision to report it. We also note that despite the numerous threats Khan claims the MQM has made against him, MQM members have never harmed any of Khan's extended family still remaining in Pakistan. In any event, because Khan fears MQM retaliation based on his decision to report a carjacking and not because of his political opinion, his fear of persecution is not based on a protected ground entitling Khan to withholding from removal.

Finally, Khan challenges the IJ's conclusion that he is not entitled to protection against removal under the CAT. "Torture," as the term is used by the CAT, includes "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). Although Khan's arguments focus on showing that he will likely suffer "persecution" and ignore whether he is likely to suffer "torture," a petitioner's failure to show a clear probability of future persecution also means he cannot show a likelihood that he will be tortured. *See, e.g., Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (citing torture as an example of persecution).

C. Motion to reopen

Khan's final argument is that the BIA erroneously denied his motion to reopen his removal

proceeding. The BIA has discretion to reopen a removal proceeding when an alien presents new evidence that "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(a), (c)(1). In his motion to reopen, Khan provided affidavits from two individuals who treated him at a clinic devoted to helping people in Khan's position—although Khan did not seek this treatment until 2006, well after his removal hearing concluded. These affidavits describe the physical evidence of and symptoms associated with Khan's kidnapping and diagnose his mental illnesses. This, in Khan's view, constituted new evidence on the issue of whether his mental illness prevented him from filing a timely asylum application and whether the MQM persecuted him. The BIA disagreed.

We pause to note that we have limited jurisdiction to review this claim. *See Pilch v. Ashcroft*, 353 F.3d 585, 586-87 (7th Cir. 2003) (holding that no jurisdiction exists to consider a denial of a motion to reopen based on discretionary determinations); *accord Durant v. INS*, 393 F.3d 113, 115 (2d Cir. 2004) (orders of removal and denials of motions to reopen "are sufficiently connected" that permitting review of the latter when the INA bars review of the former "would provide an improper backdoor method of challenging a removal order"); *Rodriguez v. Ashcroft*, 253 F.3d 797, 800 (5th Cir. 2001) ("It is axiomatic that if we are divested of jurisdiction to review an original determination by the Board . . . , we must also be divested of

jurisdiction to review the Board's denial of a motion to reopen on the [same grounds]."). In this context, our review is limited to determining whether the BIA offered a sufficient reason for declining to reopen Khan's case. *Kebe v. Gonzales*, 473 F.3d 855, 857 (7th Cir. 2007).

The BIA may decline to reopen a removal proceeding if it concludes the petitioner failed to provide previously unavailable, material evidence, and we review the BIA's refusal to reopen on these grounds for an abuse of discretion. *INS v. Doherty*, 502 U.S. 314, 323 (1992); *Kebe*, 473 F.3d at 857. We will uphold the BIA's decision "'unless it was made without rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination.'" *Paulyk*, 469 F.3d at 1091 (quoting *Boykov v. Ashcroft*, 383 F.3d 526, 530 (7th Cir. 2004)). The Supreme Court has said that motions to reopen are disfavored, and thus Khan faces a heavy uphill battle to convince us that the BIA erred. *Doherty*, 502 U.S. at 323.

We are convinced the BIA did not abuse its discretion. First, Khan did not go to the treatment center until after his original removal hearing, strongly suggesting that he did not pursue his claims with the requisite diligence. *See* 8 C.F.R. § 1003.2(c)(1) (stating that new information should be incapable of having been "discovered or presented at the former hearing"). Second, the "new evidence" was not material. Although the IJ concluded the

attacks Khan suffered were not sufficiently severe to constitute persecution, he also concluded that Khan had not established that the attacks were politically motivated or that Khan was likely to suffer politically motivated persecution if returned to Pakistan. The affidavits submitted with the motion to reopen do not address these latter conclusions and therefore do not undermine the IJ's ultimate decision to deny relief. Similarly, the IJ's conclusion that Khan's asylum application was untimely was based on his determination that Khan had not established that his emotional and psychological problems justified the four-year delay in filing the application. The affidavits discussing Khan's mental state do not address whether it would have been unreasonable to expect him to file a timely asylum application in light of that mental state. Finally, the "new evidence" was not new. The affidavits reported that Khan suffered from symptoms associated with depression, anxiety, and frustration, but also noted that he was able to obtain and maintain employment, care for his children, and focus on his future; the IJ considered similar information at Khan's removal hearing.

For the foregoing reasons, the petitions for review are DISMISSED in part for lack of jurisdiction and DENIED in part.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A96 494 318 – Chicago Date: OCT – 6 2006
A96 494 319
A96 494 320
A96 494 321

In re: ABDUL HASEEB KHAN
YASMEEN HASEEB
SARAH HASEEB
SANA HASEEB

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Kenneth Y. German, Esquire

ON BEHALF OF DHS:
Alexandra Kostich
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture

ORDER:

PER CURIAM. The Immigration Judge's decision is adopted and affirmed. *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994). The respondent[1] has failed to show clear error with the Immigration Judge's factual finding concerning the untimely filing of the asylum claim. 8 C.F.R. § 1003.1(d)(3)(i). We agree with the Immigration Judge's analysis concerning this determination, and agree that the respondent failed to show that an exceptional circumstance would apply. *See generally*, 8 C.F.R. § 1208.4.[2] The respondent's generalized medical/psychological evidence does not suggest that he was unable to timely file his claim. *See* Exh. 10.[3] As the Immigration Judge observed, the respondent remained for years in the United States before filing.

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[1] The term "respondent" herein refers to the lead respondent, Abdul Haseeb Khan (A96 494 318). The other respondents, the lead respondent's immediate family members, are derivative applicants.

[2] The respondent has not argued that the late filing should be excused because of any "changed circumstances." 8 C.F.R. § 1208.4(a)(4).

[3] That evidence includes a December 21, 2004, note–purportedly from a physician–that the respondent complained of "stress syndromes / forgetfullness [sic] and signs of depression." Exh. 10. No objective expert evidence clearly establishes an actual level of disability or when such a disability might have existed.

Therefore, the respondent is ineligible for asylum. *See* section 208(a)(2)(B) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1158(a)(2)(B).

We further agree with the Immigration Judge's denial of withholding of removal and for protection under the Convention Against Torture, for the reasons stated in the decision. *See* section 241(b)(3) of the Act; 8 C.F.R. §§ 1208.16, 1208.18. The respondent's appellate brief expresses disagreement with the factual findings underlying those determinations, but does not demonstrate clear error with those findings. 8 C.F.R. § 1003.1(d)(3)(i). Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than

$1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A96 494 318 – Chicago Date: APR 30 2007
A96 494 319
A96 494 320
A96 494 321

In re: ABDUL HASEEB KHAN
YASMEEN HASEEB
SARAH HASEEB
SANA HASEEB

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Lisa Koop, Esquire

ON BEHALF OF DHS:
Lynn K. Hollander
Assistant Chief Counsel

CHARGE:

Order: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law (all respondents)

APPLICATION: Reopening

In a decision of May 12, 2005, an Immigration Judge denied the respondent's application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, as the asylum application was untimely and the respondent had failed to meet his burden of proof regarding withholding of removal and protection under the Convention. This decision was adopted and affirmed by the Board on October 6, 2006. On January 3, 2007, the respondent filed a motion to reopen the Board decision. The motion will be denied.

The respondent's motion to reopen is timely. The respondent now submits additional medical evidence that was obtained since the Board's decision of October 2006 and claims that this new evidence could not previously be obtained due to his financial difficulties that prevented him from paying for medical help, and he did not learn of the pro bono clinic that provided the examinations until October 2006. Even if the Board were to accept this argument, we find that these medical examinations do not present any evidence that was not before the Immigration Judge in May 2005 and the examinations are not material to the reasons for denial. *See* 8 C.F.R. § 1003.2(c). *See also INS v. Doherty*, 502 U.S. 314, 316 (1992) (ruling that in a motion to reopen a ground for denial can include the

absence of previously unavailable, material evidence.)

The respondent claims that the new medical evidence shows that his mental state prevented him from filing a timely asylum application and this psychiatric disorder meets the criteria for an extraordinary circumstance exception to the filing deadline. *See* section 208(a)(2)(D) of the Act. The Immigration Judge not only determined in May 2005 that the respondent did not file his asylum application within the 1-year prescribed time limit, but also found that, even considering the respondent's emotional and psychiatric problems, the five-year period it took for the respondent to file his application was unreasonable, especially considering that the respondent acknowledged that he only filed an asylum application after the Department of Homeland Security required him to register with the National Security Entry and Exit Registration System and he feared this registration would result in his removal from the United States. *See* I.J. at 8. While noting the respondent's problems with concentration and stress after arriving in the United States, the medical examiners failed to address whether this level of disability was so severe that it prevented the respondent from filing a timely asylum application. The examiners reported symptoms of depression, nightmares, anxiety, anger, and frustration, but noted, like the Immigration Judge in May 2005, that the respondent was able to obtain and maintain employment soon after arriving in the United States. *Id. See also Matter of L-O-G-*, 21 I&N

Dec. 413, 418-19 (BIA 1996) (holding that the alleged new facts must be considered in connection with the facts already of record in determining whether to grant a motion to reopen.) In fact, the therapist found that the respondent had shown soon after arriving in the United States, the effective use of survival skills and psychological defenses that included working full-time, sending money to his family in Pakistan, parenting his children, and focusing on future plans. These findings would support the Immigration Judge's determination that the respondent, even while suffering with psychiatric symptoms, was able to find a full-time job soon after arriving in the United States and should have been able to file a timely application for asylum, or at least file such an application sooner than five years after his arrival.

It is also argued that the recently submitted medical evidence is material as it addresses the Immigration Judge's adverse credibility determination as the medical examiners found the respondent credible. However, the Immigration Judge's credibility determination was not solely based on an interview of the respondent, but also included consideration of multiple inconsistent witnesses and review of the exhibits of record, evidence that was not available to the recent medical examiners. *See* I.J. at 11-12. Furthermore, the Immigration Judge did not question the fact the respondent had been physically assaulted while in Pakistan, but determined that these assaults were not due to persecution on account of statutorily

enumerated grounds and that the respondent had failed to establish that it was more likely than not that he would be tortured if returned to Pakistan. *See* I.J. at 12-16. The recently submitted medical evidence merely recounts the incidents of physical assault which were before the Immigration Judge in May 2005 and adds no new facts that were not brought out during testimony. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (ruling that a motion to reopen is to be denied if the Board concludes that its decision on appeal would be the same even if the proffered evidence were already part of the record on appeal.) Therefore, this medical evidence is not new and material to the issues of withholding of removal and protection under the Convention Against Torture.

Based on the foregoing, we find that the respondent has not met his burden of presenting new and material evidence sufficient to reopen the Immigration Judge's May 12, 2005, decision. In addition, we find that as the recently submitted medical evidence is not new, the respondent has failed to present a prima facie case for the relief he seeks. *See Doherty, supra.* Thus, the respondent's motion to reopen must be denied.

Accordingly, the following order will be entered:

ORDER: The motion is denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A96-494-318
A96-494-319
A96-494-320
A96-494-321

Date: May 12, 2005

In the Matter of	)	
	)	
Abdul Haseeb KHAN	)	IN REMOVAL
Yasmeen HASEEB	)	PROCEEDINGS
Sarah HASEEB	)	
Sana HASEEB	)	
	)	
Respondent.	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(B) – Remained for a period longer than permitted.

APPLICATIONS: Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) – Asylum.

Section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) – Withholding of Removal.

Section 208.16, Chapter 8 of the Code of Federal Regulations, 8 C.F.R. § 208.16 – Withholding of Removal under Article 3 of the Torture Convention.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE DHS:
Kenneth Y. Geman 33 N. LaSalle Street, Suite 2300 Chicago, IL 60602	Tom O' Malley Department of Homeland Security 55 E. Monroe St., Suite 1700 Chicago, IL 60603

DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND

The respondents are natives and citizens of Pakistan who were admitted to the United States as nonimmigrants on or about June 21, 1998, at Chicago, IL. On March 13, 2003, the respondent[1]

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[1] For purposes of this decision, the Court will refer to Abdul (continued...)

Abdul Haseeb Khan filed an application for asylum and withholding of removal with the Department of Homeland Security ("DHS"). *See* Ex. 2. DHS did not grant the application and commenced removal proceedings by filing a Notice to Appear ("NTA") charging the respondent with removablity pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "Act") because he remained in the United States longer than allowed. *See* Ex. 1.

At the removal hearing on December 1, 2004, the respondent admitted the factual allegations contained in his Notice to Appear and conceded removability. Based on these admissions, the Court finds that removability has been established by clear and convincing evidence as required by the Act. *See* INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a) (2003). Because the respondent declined to designate a country of removal, the Court designated Pakistan in accordance with INA § 241(b)(1)(C).

The respondent requests relief in the form of asylum under INA § 208(a) and withholding of removal under INA § 240(c)(3) and under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or

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(...continued)
Haseeb Khan as the respondent. The three other individuals listed in the caption are Mr. Khan's wife and children, and they are derivatives of Mr. Khan's claims.

Punishment ("Torture Convention").[2] This Court has jurisdiction under 8 C.F.R. § 1208.2(b).

II. EVIDENCE PRESENTED

A. Documentary Evidence

The following documents relating to the substance of the respondent's claim were entered into the record as follows: Ex. 1, Notice to Appear; Ex. 2, Application for Asylum and for Withholding of Removal, March 13, 2003 (Form I-589 and attachments A-FF); Ex. 3, Bureau of Democracy, Human Rights and Labor, U.S. Dept. of State, *Pakistan: Country Reports on Human Rights Practices – 2002* (March 31, 2001); Gr. Ex. 4, tabs 1-7, Respondent's Motion to File Exhibits in support of respondent's application for asylum, withholding of removal, Torture Convention, and voluntary departure, Nov. 18, 2004; Ex. 5, Request for Continuance, Nov. 18, 2004; Gr. Ex. 6, tabs 1-3, Motion to File Exhibits and Request Continuance, Nov. 30, 2004; Ex. 7, Bureau of Democracy, Human Rights and Labor, U.S. Dept. of State, *Pakistan: Country Reports on Human Rights Practices – 2003* (Feb. 25, 2004); Ex. 8, Bureau of Democracy, Human Rights and Labor, U.S. Dept. of State, *Pakistan: Profile of Asylum Claims and Country Conditions* (July 1997); Ex. 9, Handwritten doctor's prescription

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[2] This application includes all of the named respondents. A spouse or child of an applicant who has been granted asylum may, if not otherwise eligible, be granted the same status as the principal alien.

for respondent's daughter Sarah (March 3, 1998); Gr. Ex. 10, tabs 1-7, Motion to File Exhibits: additional evidence in support of application for asylum, withholding of removal, Torture Convention and voluntary departure, Jan. 4, 2005.

B. Testimonial Evidence

1. Testimony of Respondent Abdul Haseeb Khan

The respondent testified that he was born on July 16, 1962 in Kahot, Pakistan, and that he and his family are mohajirs. Mohajirs are Pakistanis who emigrated from India in 1947 or their direct descendants. According to the respondent, his relatives from India, like many other mohajirs settled in the city of Karachi within the Sindh province, which is where the respondent lived in Pakistan. The respondent explained that all three of his sisters, one brother, and his mother still reside in Pakistan, while his brother, Abdul Hafeez Khan, lives in London. The respondent married Yasmeen Haseeb, also a Pakistani citizen, on August 26, 1993, and the couple has three children: Sarah, a Pakistani citizen born on June 3, 1994; Sana, a Pakistani citizen born on April 14, 1997, and Mohammed, an American citizen born on February 23, 2001.

The respondent testified that he was a member of the Mohajir Quami Movement (MQM), a political party representing the interests of mohajirs,

from 1985 to 1994.[3] He explained that he originally joined the MQM because he believed in their manifesto, and he was not aware that they used violence to further their goals. The respondent testified that as a member of the MQM, he did whatever he was asked, but most of his work for the party took place during elections, when he would transport people to the polling stations and campaign for the MQM. According to the respondent, his brother, Abdul Hafeez Khan, was more actively involved in the MQM and was close with the party leaders. The respondent testified that he left the MQM in 1994 after his brother was kidnapped for disobeying orders given to him by party leaders. *See also*, Ex. 6, tab 1.

During his testimony, the respondent described a single incident in which he was arrested by the Federal Investigation Authority of Pakistan (FIA) in March 1995. The respondent stated that he was detained for two days, because the authorities mistakenly believed that he was his brother, who was sought because of his involvement with MQM leaders. *See* Ex. 9 ("As a result of increased political violence in Sind in the first months of 1994, the security forces have from time to time resorted to mass arrests of MQM leaders and activists.") The respondent provided photographs to show the

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[3] The respondent testified that when the MQM split into two wings in 1989, he was a part of the "old faction" led by Altaf Hussain *See also*, Ex. 9 (describing the division of the MQM into two separate factions).

similarities in appearance between the two brothers. *See* Ex. 4, tab 6. According to the respondent, the FIA released him from custody after his family paid a bribe.

The respondent testified that shortly after this incident, in June 1995, he, his wife and daughter traveled to the United States in order to protect themselves from the MQM. According to the respondent, he did not file an asylum claim during this trip, because they only stayed a "short time." In fact, the respondent told the Court that the family returned to Pakistan after only 17 days, when his father suffered a second heart attack. While the respondent indicated that he was fearful of returning to Pakistan, he admitted that he and his family entered the country legally and he voluntarily returned to his previous job.

After their return to Pakistan, the respondent testified that his family resided with his father in Karachi. The respondent stated that the MQM threatened his father in December 1995. According to his testimony, MQM activists visited his father and asked that he permit the respondent to serve the MQM. When the father refused, one MQM. member allegedly threatened him, saying, "If we kill you, then you'd allow your sons to participate in our activities." Although the respondent testified that this greatly upset his family, it was an empty threat and the MQM did not harm the respondent's father.

The respondent testified that after his father's death in January 1996, he assumed his father's

monthly donations to the MQM. The respondent stated that he gave the party 500 rupees (about $10) per month in order "to keep them away." Eventually, he stopped donating to the party, testifying that the donations were "against my will, against my wishes."

The respondent stated that he believes his car was hijacked in January 1997 as retribution for his refusal to donate. He testified that the car jacking occurred a few blocks from his home, when he was driving with his wife and daughters. According to his testimony, the respondent's car was stopped and men he suspected of being MQM members forced the family out of the car. Although the respondent stated that they told him not to say anything about the hijacking he subsequently filed a police report.

After this incident, the respondent stated that he decided to leave the country, so he resigned his job and traveled to the United States in February 1998. According to the respondent's testimony, he came alone because he wanted to make arrangements for his family to settle in the U.S. The respondent stated that he returned to Pakistan after about one month because one of his daughters became ill.

According to the respondent, after his return to Pakistan, he was kidnapped by MQM members in May 1998, because he had visited the police station to check the progress of his stolen car claim. The respondent testified that the MQM allegedly saw his police visit and believed he was a police informant, so "MQM activists was [*sic*] tracking my movement." The respondent stated that these MQM members

took him to a small house "far away from the city," where they beat him and showed him severed fingers. According to the respondent, the men released him after three days and threatened to harm him if he ever returned to the police station.

After this incident, the respondent stated that he and his family left Pakistan and arrived in the United States on June 21, 1998. The respondent claims to have been very depressed when he arrived in the U.S. However, he testified that one to two months after his arrival, he secured employment as a taxi driver and has driven a taxi ever since, providing the sole support for his family.

2. Testimony of Respondent Eastman Haseeb

The respondent's wife, Ms. Haseeb, testified that she had no knowledge of her husband's involvement with the MQM until after their marriage in 1993. According to Ms. Haseeb, the respondent continued to support the MQM until 1997.

Ms. Haseeb stated that she was present when the respondent was arrested by the FIA in March 1995. According to her testimony, many people showed up at their house looking for him, but she was unable to identify whether these people were MQM supporters or the government. She stated that they kept her husband detained for two days.

When asked whey their 1995 trip to the U.S. had been cut short, Ms. Haseeb testified that her

husband, as the elder son, had to return to Pakistan to care for his father when he became ill. According to Ms. Haseeb, she remained in Pakistan when the respondent fled to the United States for a second time in February 1998, because her husband intended to settle in the U.S. and "our first visit taught me about difficulties in settling here." She explained that the respondent returned to Pakistan after a short time because their younger daughter was very ill.

Ms. Haseeb testified that her husband was detained for three days by people he told her were MQM supporters. She stated that he was kidnapped because he had stopped working actively with the MQM, and they "probably" thought he was serving as an informant. Although Ms. Haseeb initially had difficulty remembering when this kidnapping occurred, suggesting at first that it took place in 1997, she suddenly produced the exact date of May 4, 1998. When asked why she remembered the date, Ms. Haseeb suggested that it was because she knew the kidnaping took place after her younger daughter had been sick.

The respondent's wife indicated that the family moved to the United States in June 1998 as a result of the "bad things" that had happened to her brother-in-law, as well as because the respondent was "in a constant state of fear." Ms. Haseeb explained that the respondent was very anxious when they arrived in the United States and that he suffered from depression. She testified that although

the respondent started working shortly after arriving in the U.S., he often remained at home and refused to talk about what happened to him in Pakistan.

3. Testimony of Mohammad A. Khan

Mohammed Khan (no relation to the respondent) testified that he was born in Karachi, Pakistan, but left the country in 1983 to pursue an education in the United States. Mr. Khan stated that he is married to a U.S. citizen and that he naturalized in 1991.

Mr. Khan said that he and the respondent became friends in college. According to the witness, he visited the respondent on his seven or eight visits to Pakistan since moving to the U.S. in 1983, and the two men spoke on the telephone often. Mr. Khan testified that he never spoke of politics with the respondent, he was not a member of a political party in Pakistan, and he did not know whether the respondent was a member of a political party.

According to the witness, he had no contact with the respondent during his first trip to the United States in 1995, but the two men saw each other when the respondent returned in February 1998. Mr. Khan testified that the respondent, his wife and children stayed with him for two weeks when they came to the U.S. in June 1998. According to his testimony, the respondent first spoke about politics during this visit. Mr. Khan stated that the respondent gave the MQM as his reason for leaving Pakistan and told his friend about the problems

caused by his brother's former alliance with the MQM, the respondent's own kidnapping and beating, the car hijacking, and his father's illness. According to the witness, the respondent's mental condition was "not good" when he arrived in the U.S. in June 1998.

Mr. Khan testified that he advised the respondent "to get his papers" or apply for asylum in order to remain in the United States. Mr. Khan explained that although his affidavit suggested that he knew nothing about asylum, he was, in fact, aware of asylum in June 1998 but did not know about the one-year time bar. The witness could not remember whether or not he referred the respondent to an immigration attorney.

According to Mr. Khan, he and the respondent have seen each other about once or twice per month since the respondent's arrival in the U.S., and they speak to each other every day. The witness testified that although the respondent worked in a store and at a gas station, drove a cab, and lived in an apartment, his mental condition worsened in the twelve months after his arrival. Mr. Khan observed that the respondent chose not to associate himself with any other Pakistanis in the U.S., even though he had been "very sociable" in Pakistan. In addition, Mr. Khan stated that the respondent was stressed and unable to make decisions. Although Mr. Khan testified that he advised the respondent to see a doctor, he was not aware if the respondent did so.

III. ANALYSIS

A. Asylum

Under section 208(a) of the Act, the Attorney General may grant asylum to an alien who is physically present in the United States if the alien meets the statutory definition of a refugee. A refugee is defined as an individual who is unable or unwilling to return to his or her native country "because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). In order to establish eligibility for asylum, the respondent carries the burden of establishing past persecution or a well-founded fear of future persecution. *Id.*; *Matter of Chen*, 20 I&N Dec. 16, 17 (BIA 1989); *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985).

1. One-Year Time Bar

As a preliminary matter, the government contends that the respondent should be precluded from applying for asylum because he failed to timely file his application for asylum. The respondent, however, contends that although he has filed his application after the one-year time period, he merits a waiver due to extraordinary circumstances.

Section 208(a)(2)(B) of the Act provides that an applicant may not apply for asylum unless he or she demonstrates by clear and convincing evidence that he or she applied for asylum within one year after the date of arrival in the United States. *See* INA § 208(a)(2)(B); *Matter of R-R-*, 20 I&N Dec. 547, 550

(BIA 1992) (applicant must reasonably explain her failure to timely request asylum). An applicant may apply for asylum beyond the one-year deadline only if he or she demonstrates to the satisfaction of the court either the existence of changed circumstances which materially affect eligibility for asylum, or extraordinary circumstances relating to the delay in filing an application for asylum within one year after arriving in the United States. *See* INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)(4) & (5).

The term "extraordinary circumstances" refers to events or factors beyond the applicant's control that caused his or her failure to timely file the application. 8 C.F.R. § 208.4(a)(5). The regulations define "extraordinary circumstances" as including, but not limited to, "[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival." *Id.* at (i). Nevertheless, such circumstances will excuse the failure to timely file so long as the respondent filed the application within a reasonable period given those circumstances. *See id.* Finally, it is the respondent's burden to establish that such circumstances were beyond his control and that, but for those circumstances, he would have timely filed his application. *Id.*

In the instant case, the respondent arrived in the United States on June 21, 1998, but did not apply for asylum until March 13, 2003, when he was required to register for NSEERS (National Security

Entry and Exit Registration System).[4] The respondent asserts that he was unable to file an asylum application in a timely manner because (1) he was unaware of the one-year filing deadline; and (2) he was "upset, afraid and depressed" upon arrival in the United States. Ex. 2. The respondent testified that he feared the United States would disclose information about him to the Pakistani government, which would jeopardize the safety of respondent's family remaining in Pakistan.

After consideration of the respondent's testimony and the record in its entirety, I find that the respondent fails to fall within the "exceptional circumstances" exception and that his application for asylum was not timely filed.

Although the respondent testified that he was unaware of the procedure for filing for asylum when he first arrived in 1998, the respondent lived with a friend who was a native of Pakistan and was familiar with seeking asylum. Mr. Mohammed A. Khan, the respondent's witness, testified that he did advise the respondent to file for asylum in 1998.[5] However,

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[4] Natives and citizens of Pakistan who remained in the United States beyond their authorized time were required to register with INS (now the Department of Homeland Security) by March 30, 2003. The respondent testified that he was afraid that he would be returned to Pakistan and therefore decided to file an asylum application prior to his registration.

[5] Mohammed Kahn's testimony in court was inconsistent with his affidavit, in which he claimed to be unaware of "legel [*sic*]

(continued...)

regardless of whether Mohammed Khan informed the respondent of the one-year time bar, ignorance of the law is not an extraordinary circumstance according to the guidelines in 8 C.F.R. § 208.4(a)(5).

Secondly, while the respondent contends that when he arrived in the United States, he was depressed, the respondent's condition falls short of a serious illness or disability and thus an "extraordinary circumstance." Moreover, five years elapsed between the respondent's arrival in the U.S. and his filing. The Court finds that waiting for almost five years is not reasonable. *See* Asylum Procedures, 65 Fed. Reg. 76121, 76123-24 (Dec. 6, 2000) (to be codified at 8 C.F.R. pt. 208) ("Generally, the Department expects an asylum-seeker to apply as soon as possible after expiration of his or her valid status, and failure to do so will result in rejection of the asylum application. Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.") The record reflects that the respondent was able to work as a cab driver, rent an apartment, support his family, and function without any difficulties for more than five years. He further admitted that the only reason he filed for asylum was because he was faced with the NSEERS registration requirement. Given these factors, this Court does not believe that the respondent's state of depression when he arrived

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(...continued)
matters for applying political Assylum [*sic*]" and the one-year bar in particular.

prevented him from filing for asylum within "a reasonable period of time" after the one-year time limit.

Therefore, upon due consideration of the record, this Court finds that "exceptional circumstances," as that term is defined in the Act, have not been established by the respondent. As such, the respondent's application for asylum is deemed time-barred, and will be denied on that basis.

B. Withholding of Removal

An asylum application is also considered an application for withholding of removal and the one-year filing deadline in section 208(a)(2)(B) of the Act does not apply to applications for withholding of removal under section 241(b)(3) of the Act. *See* 8 C.F.R. § 1208.4(a).

To be eligible for withholding of removal pursuant to section 241(b)(3) of the Act, the respondent must demonstrate a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1984); *Matter of Mogharrabi*, 19 I. & N. Dec. at 439. The respondent must establish that it is more likely than not that he or she would be subject to persecution for one or more of the enumerated grounds. *Id.* The burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal.

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *Sharif v. INS*, 87 F.3d 932, 935 (7th Cir. 1996).

The respondent may establish eligibility for withholding of removal based on past persecution. 8 C.F.R. § 1208.16(b)(1)(i). If the respondent establishes that he or she suffered past persecution on account of one of the five protected grounds, then "it shall be presumed that the [respondent's] life or freedom would be threatened in the future in the country of removal on the basis of the original claim." *See id.* However, this presumption may be rebutted by a preponderance of the evidence establishing either that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five protected grounds or that the respondent could avoid a future persecution by relocating to another part of the country of removal, and under the circumstances it would be reasonable to expect him or her to do so. 8 C.F.R. § 1208.16(b)(1(i)(A), (B).

1. Past Persecution

An alien may be eligible for withholding of removal based on past persecution. A showing of past persecution creates a presumption that an applicant has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1); *Marquez v. INS*, 105 F.3d 374, 379 (7th Cir. 1997). Although the statute provides no definition of "persecution" the Seventh Circuit Court of Appeals, in a succession of cases, has both described and limited this term. *See, e.g., Mitev v. INS*, 67 F.3d 1325, 1330-31 (7th Cir. 1995).

Persecution has been described as the "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *DeSouza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993). Although "persecution encompasses more than threats to life or freedom," *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000), such actions must "rise above the level of mere 'harassment.'" *Sofinet v. INS*, 196 F.3d 742, 746 (7th Cir. 1999) (citing *Borca v. INS*, 77 F.3d 210, 214 (7th Cir. 1996)). "Types of actions that might cross the line from harassment to persecution include: 'detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture'" *Begztowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002) (quoting *Mitev*, 67 F.3d at 1330).

The Seventh Circuit has held that a single episode of detention or physical abuse may constitute past persecution. *See Vaduva v. INS*, 131 F.3d 689 (7th Cir. 1997) (holding that past persecution was established by an incident in which the respondent was punched, his face bruised, and his finger broken); *Asani v. INS*, 154 F.3d 719 (7th Cir. 1998) (holding that a single incident in which the respondent had two teeth knocked out and was deprived of sufficient food and water caused "serious injuries" and resulted in "physical or psychological harm").

After reviewing the record in its entirety, this Court finds that the respondent is not eligible for withholding of removal based on past persecution.

A. Alleged Incidents of Past Persecution

The respondent claims to have experienced three incidents which, when considered in the aggregate, constitute past persecution. Although the respondent was forced to deal with harsh conditions, the Seventh Circuit has recognized that "unpleasant and even dangerous conditions do not necessarily rise to the level of persecution." *Mitev v. INA*, 67 F.3d 1325, 1331 (7th Cir. 1995). This Court finds that the three incidents described by the respondent fail to rise to the level of past persecution.

(1) Arrest by the Federal Investigative Authority

The first incident described by the respondent was an isolated arrest in March 1995 by the Federal Investigative Authority of Pakistan ("FIA"). According to the respondent, he was arrested as a result of mistaken identity; the FIA thought that the respondent was his brother, who they sought because of his brother's involvement in the MQM. The respondent provided photographs showing the similarities in appearance between him and his brother, *see* Ex. 4, tab 6.

At the removal hearing, the respondent conceded that the first incident, considered alone, does not rise to the level of past persecution. This Court agrees. Although the respondent testified that

he was threatened and punched while in FIA custody, this Court finds that this does not constitute persecution because the respondent was not seriously harmed.[6] While the respondent claims that he left the country and came to the United States to avoid any further confrontations with the authorities, he returned home voluntarily and remained there for more than three years. Moreover, the respondent does not fear returning to Pakistan because of this past brief arrest or because of his brother's former support for the MQM. Thus, this isolated incident falls far short of constituting past persecution.

(2) Carjacking by the MQM

The second incident mentioned by the respondent occurred after residing with his father and family in Karachi, Pakistan. The respondent claimed that although he had formerly supported the MQM, solicitors still came to his father's home frequently demanding donations. The respondent indicated that his father contributed on a regular basis because of fear of possible repercussions. The respondent admitted that these solicitors would go throughout the neighborhood trying to raise money. Even after his father's death in 1996, the respondent admitted that he continued to make these donations. Eventually, the respondent's stopped donating. In December 1997, the respondent's car was hijacked

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[6] The respondent testified that after his release, he saw a doctor who merely gave him pain medication.

when he was stopped. The respondent testified that he believes that the thieves may have been supporters of the MQM. The respondent suggested that his car may have been taken because he had stopped making donations. The respondent, however, apart from losing his car, suffered no physical harm as a result of the incident. While he testified that the incident caused him to leave Pakistan, he did not file for asylum after his arrival in the U.S., but instead returned home after one month because of a sick child. The stealing of the respondent's car by unknown assailants fails to constitute past persecution.

(3) Kidnapping by the MQM

The final incident offered by the respondent as evidence of persecution is his purported kidnapping by MQM activists in May 1998. However, this Court finds that the circumstances surrounding this incident were implausible and not credible and also do not rise to the level of persecution.

Respondent testified that after he voluntarily returned to Pakistan, he went to the police station to see if they had made any progress concerning the theft of his car. The respondent claims that his "entry" into the police station was "seen" by alleged MQM supporters who "may" have been involved in the car heist. The respondent testified that he was then kidnapped and held for three days and questioned whether he was "informing" on the MQM. The respondent testified that during the three days, he was beaten and shown severed fingers. The

respondent was released but was threatened with additional harm should he "cooperate" with the police. The respondent then returned to the United States with his family and overstayed his authorized time as a visitor.

In evaluating the credibility of the respondent's claim, this Court looks to the internal consistency of the respondent's story, the plausibility of the claim, its rationality, and the way it hangs together with the other evidence. The respondent's story is simply not credible in this case.

First, the respondent seemed unsure of who even took his car in December 1997. Assuming that some of the criminals were MQM supporters, his testimony failed to explain why these men would be observing the entrance to a police station at the exact moment that the respondent entered in May 1998. Respondent admitted that he reported the theft of his car shortly after it was taken and did not tell the police who took it. He also did not claim that he was threatened at the time he filed the complaint with the police. It is not plausible or reasonable that the respondent's trip to the police station to report the theft of his car shortly after the carjacking caused him no harm, yet, six months later he was detained for "allegedly cooperating with the police". The connection between the theft of the respondent's car and his kipnapping six months later appears to be weak and tenuous at best.

The respondent's wife's testimony also cast doubt on the veracity of the respondent's contention.

The respondent's wife initially testified that the kidnapping took place in 1997 and may have occurred because her husband had stopped working actively with the MQM, and "they probably though he was serving as an informant." The respondent's wife never mentioned any nexus between the car jacking and her husband's detention. Although the respondent's wife realized that she had provided the wrong information, her sudden recollection of the exact date of May 4, 1998 was less than convincing especially in light of the fact that she also testified that her husband had already decided to settle in the United States when he traveled to the United States in February, 1998 for his second trip.

Finally, the respondent's credibility is questionable based on the timing of his claim for asylum and withholding of removal. The Seventh Circuit has recognized that the timing of an asylum claim can negatively impact a respondent's claim for asylum or withholding of removal. *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004). In *Balogun*, the Seventh Circuit upheld a denial of asylum relief based on the fact that Ms. Balogun traveled back and forth to the United States multiple times and did not seek asylum on any previous trip. Instead, she articulated her claimed fear "only when faced with a concrete threat of deportation." *Id.* at 503. In the present case, the respondent traveled to the United States on two prior occasions but did not apply for asylum either time. In addition, after the respondent's third and final trip to the United States, he did not apply for asylum until five years

later when he was "faced with a concrete threat of deportation" in the form of mandatory registration with INS. Thus, this Court believes that the respondent's claim that he was harmed in 1998 is undercut by the failure to timely file for asylum.

Even assuming that the respondent was detained by MQM supporters, all detentions by non-governmental individuals do not rise to the level of past persecution. *Mitev v. INS*, 67 F.3d 1325, 1330-31 (7th Cir. 1995). Here, the respondent was released, not severely harmed, and simply warned not to go to the police station again. While the respondent did submit a letter from a physician in Pakistan who claims to have seen the respondent after the alleged kidnapping, this letter does not indicate that the respondent was seriously harmed.[7] Additionally, this appears to be an isolated incident of violence. This Court does not believe that this incident, even if true, rises to the level or magnitude sufficient to constitute past persecution when the record is considered in its entirety.

(4) In the Aggregate

The respondent also claims that all three incidents, when considered in the aggregate, rise to

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[7] Although the doctor's letter states that the respondent had "multiple injuries," it details nothing more severe than bruises requiring first aid and a recommendation that the respondent seek follow-up care at a hospital, which he did not do. *See* Ex. 4, tab 2.

the level of past persecution.[8] This Court, however, finds that even if the three incidents are aggregated they fall short of establishing past persecution. In the first incident, the respondent was allegedly detained by the government for a brief period of time because of a mistaken identification. In the latter two incidents, the respondent claims harm by the MQM. However, neither the FIA arrest, nor the carjacking and the kidnapping considered together, compels a finding of past persecution. Although the carjacking and the kidnapping are serious incidents, the Seventh Circuit has held that various acts, while severe, still do not rise to the level of persecution. *See, e.g., Prela v. Ashcroft*, 394 F.3d 515, 518 (7th Cir. 2005) (finding that multiple instances of police interrogation, a 24-hour detention, harassment for money, and a beating that caused injury to hands did not constitute past persecution); *Dandan v. Ashcroft*, 339 F.3d 567, 573-74 (7th Cir. 2003) (finding that detention for three days without food and beatings that caused facial swelling did not compel a finding of past persecution); *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir. 1990) (affirming that periodic searches, arrests, and detainments did not constitute past persecution)." Similarly, this Court finds that the respondent's stolen car and three-day detention by the MQM, even considered together, do not compel a finding of past persecution.

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[8] At the removal hearing, however, the respondent's attorney admitted that his claim for withholding was "marginal" at best.

B. On Account of

Even if this Court found that the respondent had established past persecution, his claim would still fail because he has provided insufficient evidence to show that it was based on one of the five protected grounds. An applicant for or withholding asylum is not required to show conclusively why persecution occurred in the past or is likely to occur in the future; however, the applicant must produce evidence from which it is reasonable to believe that harm was motivated, at least in part by an actual or imputed protected ground. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *see also Matter of S-P-*, 21 I&N 486, 489 (BIA 1996).

The respondent claims that he was persecuted based on his political opinion. In *INS v. Elias-Zacarias*, the United States Supreme Court held that to show persecution "on account" of political opinion, the respondent must provide some evidence of either the direct or circumstantial motivation of the persecutor. 502 U.S. 478, 483 (1992). "Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not." *Matter of S-P-*, 21 I&N 486, 489 (BIA 1996).[9] "In determining the motivation for

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[9] In *Matter of S-P-*, the Respondent was Sri Lankan national who was forced to work at a camp as a welder for the Liberation Tigers of Tamil Eelam ("LTTE"). The camp was raided by the Sri Lankan army, and the Respondent was tortured and imprisoned by the Government in an effort to ascertain

(continued...)

threats or harm in an actual or imputed political opinion asylum claim, the record must be examined for direct or circumstantial evidence from which it would be reasonable to conclude that those who threatened or harmed the respondent were in part motivated by an assumption that her political views were antithetical to their cause." *See Matter of T-M-B-*, 21 I&N Dec. 775, 778 (BIA 1997). The Seventh Circuit has recognized that an applicant can establish a "political opinion" under the Act by demonstrating that a political opinion was imputed to him or her. *See Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998).

This Court finds that the respondent has failed to show that any of the three incidents were on account of his imputed or actual political opinion. The first incident, respondent's arrest by the FIA, involves a case of mistaken identity rather than political opinion. FIA officers did not arrest the respondent because they assumed that he, like his brother, was an active MQM supporter. The respondent was arrested solely because these officers incorrectly believed that he *was* his brother, which does not constitute an imputed political opinion.

The respondent claims that he was carjacked because he stopped making "contributions" to the

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information about the LTTE resistance. In that case, the BIA found that the persecutor's actions were "in part motivated by an assumption that his political views were antithetical to those of the Government."

MQM. However, he has failed to show that political opinion motivated the MQM either to collect money from him or to carjack him once he refused to contribute. The MQM did not single out the respondent to make these contributions. In fact, the respondent testified that"the MQM would take money from everyone in neighborhood" and provided documentation indicating that the MQM had collected a forced monthly tax from "the common, ordinary citizen" in Karachi since 1988, Ex. 2, tab. EE, p. 11-12. In the alternative, the respondent claims that his refusal to contribute led the MQM to impute a political opinion to him, specifically that he was opposed to their cause, and that they carjacked him based on this imputed political opinion. However, the Court finds that the carjacking was nothing more than a criminal act motivated by the MQM's need for financial support to sustain its political agenda.

Finally, the respondent has provided insufficient evidence to show that the MQM kidnapped him on account of his political opinion.[10] Other than the his speculative testimony, he has provided no corroborating evidence to establish that the MQM was motivated, at least in part,[11] to kidnap

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[10] This Court doubts the plausibility and credibility of respondent's account of being kidnaped by MQM members.

[11] In *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), the Board held that there may be mixed motive cases and the applicant need only show that persecution was motivated in part by an actual or imputed political opinion.

him because of an imputed political opinion. Rather, the evidence suggests that the kidnapping occurred due to the kidnappers' mistaken belief that the respondent was a police informer. Inasmuch as the respondent failed to establish that he suffered persecution on account of an imputed (or actual) political opinion, he has failed to establish that he suffered past persecution under the INA.

3. Fear of Future Persecution

The respondent has also failed to establish that he has a "more likely than not" fear of future persecution. Courts have indicated that an alien can establish eligibility of withholding of removal by showing that it is "more likely than not" that he would be subject to persecution for one or more of the enumerated grounds. *See INS v. Stevic*, 480 U.S. 421, 452 (1987). The burden of proof required to establish eligibility for withholding of removal is higher than that required for asylum. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Sharif v. INS*, 87 F.3d 932, 935 (7th Cir. 1996).

The respondent testified that he fears returning to Pakistan because he believes that the MQM will harm him. However, the genuineness of this fear is undermined somewhat by the fact that the respondent voluntarily returned to Pakistan after the carjacking incident. Moreover, this Court finds that his fear is not objectively reasonable. Although the respondent testified that it is MQM policy "to make an example in society that those who are the informers be never allowed to settle in this

country," he has failed to present any evidence to corroborate this statement. Also, the respondent has not shown that the government of Pakistan is either unwilling or unable to protect him. His contention that the MQM is now a part of the national government is not enough to show that the MQM poses a danger to the respondent. In addition, the respondent has provided no information to suggest that the government would not protect him in light of the criminal activity of which he was a victim.

Finally, the timing of the respondent's claim for asylum and withholding of removal undermines the objective reasonableness of his fear. The respondent has been away from Pakistan for seven years. If he were to return, it is not objectively reasonable that there would be any MQM members who would still seek to harm him because of their past suspicions. The respondent has not been political active in more than ten years and has taken no action against the MQM. Thus the respondent's claim is attenuated by time and his absence from Pakistan. In addition, "[t]he fact that the petitioners' family members continue to live unmolested in their native country supports the conclusion that the petitioners lack a well-founded fear of persecution." *Toptchev v. I.N.S.*, 295 F.3d 714, 722 (7th Cir. 2002). Although the respondent's mother, three sisters, and one brother currently reside in Pakistan, he testified that none of his family members has been threatened by the MQM, even though they still do not donate to the party. Therefore, the respondent has failed to establish that he has a more likely than not fear of

future persecution in the event that he is returned to Pakistan.

C. Withholding of Removal under Torture Convention

An applicant for asylum and withholding of removal shall also be considered for eligibility for withholding of removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. *See* 8 C.F.R. § 208.13(c)(1).

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 208.18(a)(1). The severe pain or suffering must be inflicted on the applicant or a third person for one of four purposes, specifically: (1) to obtain information or a confession; (2) to punish for an act she committed or is suspected of having committed; (3) to intimidate or coerce; or (4) for any reason based on discrimination of any kind. *See id.* In addition, in order to constitute "torture," the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 208.18(a)(6). Further, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). "Acquiescence"

requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7). Torture is an "extreme form of cruel and inhuman treatment" but does not include pain or suffering arising from lawful sanctions. 8 C.F.R. § 208.18(a)(2), (3). Lawful sanctions, however, do not include sanctions which defeat the objectives and purpose of the Torture Convention. 8 C.F.R. § 208.18(a)(3).

In order to constitute torture, mental pain or suffering must be "prolonged." 8 C.F.R. § 208.18(a)(4). It also must be caused by or result from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration of mind altering substances or similar procedures, or threatened imminent death. *Id.* These causes or results can be directed towards the applicant or another individual. *Id.*

An applicant for withholding of removal under the Torture Convention bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2). As with asylum, this burden can be established by testimony without corroboration if the testimony is credible. *See id.*; *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). In assessing whether the applicant has satisfied the burden of proof, the court must consider all evidence relevant to the possibility of future torture, including: "evidence of past torture inflicted upon the

applicant; evidence that the applicant could relocate to a part of the country of removal where she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and other relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3).

As discussed above, the respondent has failed to establish that he has a more likely than not fear of persecution if removed to Pakistan. Similarly, the respondent has failed to establish that it is more than likely that he will be tortured if removed to Pakistan. Specifically, he has failed to provide credible evidence of past torture inflicted upon him or his family by or with the consent or acquiescence of a public official or other person acting in an official capacity. The respondent testified that he was beaten while in FIA custody over a period of two days. Because this beating did not cause "severe physical pain or suffering," it does not constitute past torture. Moreover, the respondent has not shown that the MQM will harm him or that such harm would be with the consent or acquiescence of the government. As such, the respondent's application for withholding of removal under the Torture Convention must be denied.

D. Voluntary Departure

Section 240B of the Act permits the Attorney General to grant an alien the privilege of voluntary departure if the respondent can establish that: (1) he has been physically present in the United States for

a period of at least one year immediately preceding the date the NTA was served; (2) he has been a person of good moral character during the five year period immediately preceding the application for such relief; (3) he is not removable under section 237(a)(2)(A)(iii) or 237(a)(4)(B) of the Act; (4) he has the means to depart the United States voluntarily and intends to do so; and (5) he merits the relief as a matter of discretion. *See* INA § 240B(a)(1). The respondent is also required to post a departure bond to ensure her compliance. *See* INA § 240B(b)(3). As the respondent appears statutorily eligible, the Court will grant her the privilege of voluntarily departing the United States.

Accordingly, the following orders will be entered:

ORDERS OF THE IMMIGRATION JUDGE

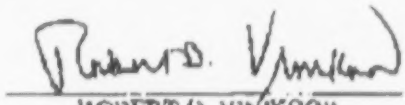
IT IS HEREBY ORDERED that the principal respondent's application for asylum and withholding of removal be DENIED.

IT IS FURTHER ORDERED that the principal respondent's application for withholding of removal under the Torture Convention be DENIED.

IT IS FURTHER ORDERED that in lieu of an order of removal, the respondent and his family mentioned above be granted voluntary departure without expense to the government on or before July 11, 2005 or any extension beyond such date as may be granted by the Department of Homeland Security, and under such conditions as the Department shall

impose. The respondents are also required to post a $500 departure bond each within five working days of the date of this decision to insure his compliance.

IT IS FURTHER ORDERED that if the respondents fail to depart as required, the above order shall be withdrawn without further notice or proceedings, and the following order shall thereupon become immediately effective: the respondents shall be removed to Pakistan on the charge contained in the Notice to Appear.



ROBERT D. VINKOOR
IMMIGRATION JUDGE

Constitutional, Statutory and Regulatory Provisions Involved

Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * * *

8 U.S.C. 1158(a)(2)

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General

finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

* * * *

8 U.S.C. 1158(a)(3)

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

* * * *

8 U.S.C. 1252(a)(2)(B)

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

* * * *

8 U.S.C. 1252(a)(2)(D)

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

8 C.F.R. § 208.4(a)(2)

(2) *One-year filing deadline.* (i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday,

Sunday, or legal holiday. For the purpose of making determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of this chapter. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 3.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline.

* * * *

8 C.F.R. § 208.4(a)(4)

(4) *Changed circumstances.* (i) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the

applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

* * * *

8 C.F.R. § 208.4(a)(5)

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (*e.g.*, the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and

what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

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(2)

No. 09-229

In the Supreme Court of the United States

ABDUL H. KHAN, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that the lead petitioner failed to establish "to the satisfaction of the Attorney General" "extraordinary circumstances" to excuse the untimely filing of his asylum application under 8 U.S.C. 1158(a)(2)(D).

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In the Supreme Court of the United States

No. 09-229

ABDUL H. KHAN, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-25a) is reported at 554 F.3d 681. The decisions of the Board of Immigration Appeals (Pet. App. 26a-29a, 30a-34a) and the immigration judge (Pet. App. 35a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. A petition for rehearing was denied on April 1, 2009 (Pet. App. 1a-2a). On June 19, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 20, 2009. On July 16, 2009, Justice Stevens further extended the time to August 20, 2009, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. An alien who wishes to be granted asylum must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if he demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect his eligibility for asylum or "extraordinary circumstances" that excuse his failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence,"

that his application for asylum was filed within one year of his arrival in the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal,

an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975). An alien is not eligible for withholding of removal if he or she "could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. 1208.16(b)(2).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a certain country may obtain CAT protection. To qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 240 (4th Cir. 2004).

d. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination whether the alien has demonstrated to the satisfaction of the Attorney General that there are changed or extraordinary circumstances warranting consideration of an untimely application as a matter of discretion. 8 U.S.C. 1158(a)(3).

In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section)

> which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Lead petitioner Abdul Khan (petitioner) is a native and citizen of Pakistan.[1] Pet. App. 4a. He is a Mohajir, a Pakistani of Indian descent. *Id.* at 39a. He arrived in the United States with several family members in June 1998 on a six-month, non-immigrant visitor visas. *Id.* at 7a.

Petitioner and his family members remained in the United States after their lawful status expired. Pet. App. 7a. In June 2002, the Attorney General announced the National Security Entry-Exit Registration System (NSEERS), which required aliens from particular countries (including Pakistan) to register with immigration officials. *Id.* at 8a. In March 2003, almost five years after he entered the United States, petitioner filed an application for asylum, withholding of removal, and protection under the CAT. *Ibid.* Petitioner contended that he would be persecuted if he returned to Pakistan by the Mohajir Quami Movement (MQM), a political party representing the interests of Mohajirs, because he had quit that organization and stopped providing it with financial support. *Id.* at 39a-43a. The Department of Homeland Security charged petitioner with being removable as an alien who remained in the United States beyond the

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[1] The other petitioners' claims for relief and protection from removal are derivative of the lead petitioner's claims.

time permitted and referred his asylum application to an immigration judge (IJ). Administrative Record (A.R.) 603-605; Pet. App. 37a; see 8 U.S.C. 1227(a)(1)(B).

At his removal hearing, petitioner conceded that he was removable as charged. Pet. App. 37a; A.R. 118. He renewed his application for asylum, withholding of removal, and CAT protection. Pet. App. 37a-38a. In the alternative, he sought voluntary departure. *Id.* at 38a. Petitioner testified that he is a Mohajir and that he was a member of MQM from 1985 to 1994. *Id.* at 39a-40a. He stated that after MQM began using violence to pursue its goals, he left the organization but continued to provide it with financial support. *Id.* at 40a-42a. Petitioner said he eventually stopped providing financial support. *Id.* at 42a. Petitioner stated that in December 1997, he was carjacked by people he thought were MQM members, and that in May 1998, he was kidnaped by MQM members, he believed because he had reported the carjacking to the police. *Id.* at 42a, 55a-57a. Petitioner acknowledged that he came to the United States twice between 1995 and 1998, and returned voluntarily to Pakistan each time. *Id.* at 41a-43a.

The IJ found petitioner removable as charged, rejected his asylum, withholding, and CAT claims, and granted his application for voluntary departure. Pet. App. 35a-70a. The IJ found petitioner ineligible for asylum because he did not file his application within one year of his entry into the United States and did not demonstrate extraordinary circumstances to excuse his untimely filing. *Id.* at 47a-51a.[2] As the IJ explained, petitioner claimed that two circumstances excused his un-

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[2] Petitioner did not argue that the changed circumstances exception to the one-year bar applies in this case.

timely filing: his lack of knowledge about the process for seeking asylum, and mental health issues. *Id.* at 49a-50a.

Regarding the first circumstance, the IJ determined that petitioner actually was aware of the process for seeking asylum, because during his second trip to the United States, petitioner "lived with a friend who was a native of Pakistan and was familiar with seeking asylum," and that friend testified that he advised petitioner to seek asylum at that time. Pet. App. 45a-46a, 49a. In any event, the IJ determined, "ignorance of the law" is not an extraordinary circumstance sufficient to justify an untimely asylum filing. *Id.* at 50a.

With respect to the second circumstance, the IJ determined that petitioner's depression does not qualify as an extraordinary circumstance, and that even if it did, petitioner failed to file his application within a reasonable period of time in light of that circumstance. Pet. App. 50a-51a. The IJ observed that petitioner has been able to work in the United States, rent an apartment, support his family, and "function without any difficulties for more than five years." *Id.* at 50a. The IJ also noted that petitioner "admitted that the only reason he filed for asylum was because he was faced with the NSEERS registration requirement." *Ibid.*

The IJ then denied petitioner's claim for withholding of removal on two independent grounds: the conduct of which he complained did not rise to the level of persecution, and petitioner did not show that any persecution by MQM would be on account of a protected ground. Pet. App. 52a-66a. First, the IJ determined that the alleged carjacking was not past persecution by MQM, because petitioner suffered no physical harm, and there was no evidence that the carjacking was perpetrated by MQM

members. *Id.* at 56a. Further, the IJ found that petitioner's account of being kidnaped by the MQM was "implausible and not credible," *ibid.*,[3] and that even if it had occurred, it did not "rise[] to the level or magnitude sufficient to constitute past persecution when the record is considered in its entirety," *id.* at 59a. The IJ also determined that petitioner failed to show a likelihood of future persecution, because he has voluntarily returned to Pakistan on several occasions; he has been away from Pakistan for seven years, so that "it is not objectively reasonable that there would be any MQM members who would still seek to harm him"; and several family members have continued to live in Pakistan without incident. *Id.* at 64a-65a.

Second, and in any event, the IJ determined that petitioner failed to show that any persecution by the MQM would be based on his political opinion. Pet. App. 61a-64a. As the IJ explained, petitioner contended that he was carjacked because he stopped paying money to MQM, which is not on account of his political beliefs. *Id.* at 63a. Indeed, the IJ noted, petitioner said that the MQM sought payment from everyone in his neighborhood, not just him. *Ibid.* The IJ determined that even if petitioner's account of his kidnaping were credible, the kidnaping was due to the MQM's "belief that [petitioner]

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[3] The IJ explained that petitioner's claim that MQM members kidnaped him in retaliation for reporting the carjacking made no sense, because petitioner was "unsure of who even took his car," and even if it had been the MQM, it was unlikely that the kidnaping was in retaliation for reporting the carjacking to the police, because six months elapsed between the two events. Pet. App. 57a-58a. The IJ also observed that petitioner's wife's testimony was inconsistent with his story, *ibid.*, and the fact that he made multiple trips to the United States but then voluntarily returned to Pakistan each time undercut his claim, *id.* at 58-59a.

was a police informer," not petitioner's political opinion. *Id.* at 63a-64a.

The IJ then denied petitioner's CAT claim, finding that petitioner failed to show that he would be tortured by the MQM if he returned to Pakistan and that such torture would be with the consent or acquiescence of the government. Pet. App. 68a. Finally, the IJ granted petitioner's application for voluntary departure and stated that he must depart the United States by July 11, 2005. *Id.* at 68a-69a.

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 26a-29a. The Board "adopted and affirmed" the IJ's decision. *Id.* at 27a. With respect to the question whether to excuse petitioner's untimely filing of his asylum application, the Board found no clear error in the IJ's factual findings and "agree[d] with the [IJ's] analysis." *Ibid.* The Board stated, in particular, that petitioner's "generalized medical/psychological evidence does not suggest that he was unable to timely file his claim." *Ibid.* The Board also "agree[d]" with the IJ's denial of withholding of removal and CAT protection, and it ordered petitioner to voluntarily depart the United States within 60 days. *Id.* at 28a-29a. To the best of the government's knowledge, petitioner did not depart within the time permitted.

Petitioner filed a petition for review of the Board's decision. Petitioner then filed a motion to reopen his immigration proceedings, which the Board denied. Pet. App. 30a-34a. The Board explained that the medical evidence petitioner proffered with his motion to reopen was not new, previously unavailable evidence, because the IJ considered similar medical evidence and determined that, even in light of that evidence, it was unreasonable for petitioner to wait five years to file his asylum

application in light of the fact that he was able to work steadily in the United States, support his family, send money back to relatives in Pakistan, and make plans for the future. *Id.* at 32a-33a. Further, the Board determined that the evidence that "recount[ed] the incidents of physical assault" against petitioner did not justify reopening, because the IJ found that even if those events occurred, petitioner failed to show that they were on account of a protected ground. *Id.* at 33a-34a.

Petitioner filed a petition for review of the denial of his motion to reopen, which was consolidated with the petition for review he had previously filed.

4. The court of appeals denied in part and dismissed in part the consolidated petition for review. Pet. App. 1a-25a. As relevant here, the court held that under 8 U.S.C. 1158(a)(3), it lacked jurisdiction to review the Board's determination that petitioner had failed to sufficiently demonstrate extraordinary circumstances to excuse petitioner's late filing of his asylum application. Pet. App. 9a-17a. The court explained that it lacked jurisdiction under Section 1158(a)(3) "to review any decision the agency makes under § 1158(a)(2), including decisions relating to whether the applicant has demonstrated 'extraordinary circumstances' excusing a delay in filing an asylum application." *Id.* at 10a. The court further explained that Section 1252(a)(2)(D) does not restore jurisdiction over petitioner's claim, because "factual determinations (such as whether the asylum application was filed within the one-year deadline) and discretionary decisions (such as whether the alien has demonstrated 'extraordinary circumstances' justifying the delay) do not fall within the exception * * * for constitutional claims or questions of law." *Id.* at 10a-11a. The court concluded that petitioner's claim, which

was "an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," raised no question of law and therefore was unreveiwable. *Id.* at 15a-16a (internal quotation marks omitted).

The court of appeals also upheld the denials of petitioner's claims for withholding of removal and CAT protection as supported by substantial evidence, Pet. App. 17a-22a, and determined that the Board did not abuse its discretion in denying petitioner's motion to reopen, *id.* at 22a-25a. Petitioner does not seek review of those rulings.

ARGUMENT

Petitioner contends (Pet. 27) that the court of appeals erred in holding that it lacked jurisdiction to review the determination of the Board of Immigration Appeals that petitioner failed to demonstrate to its satisfaction extraordinary circumstances that would warrant consideration of his untimely asylum application. The court of appeals correctly rejected that contention. But while petitioner's application for the discretionary relief of asylum was rejected as untimely, he was still permitted to apply for withholding of removal. The IJ and the Board fully considered petitioner's withholding claim on the merits and rejected it as not supported by the evidence. The court of appeals sustained the Board's ruling on that issue, and petitioner has not sought review of that ruling in this Court. This case thus presents only the issue whether the court of appeals erred in concluding that it did not have jurisdiction to review the Board's rejection as untimely of petitioner's additional request for the related discretionary relief of asylum, including the Board's determination that he had not made a sufficient showing to the satisfaction of the Board of extraordinary circumstances that would warrant an exercise of

the Board's discretion to consider petitioner's asylum application notwithstanding its untimely filing.

All but one of the courts of appeals to consider the issue have held that they do not have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to demonstrate to its satisfaction that there were changed circumstances or extraordinary circumstances warranting consideration of an untimely application. The Ninth Circuit has reached a contrary conclusion. The Court has nonetheless denied certiorari petitions raising this issue on a number of occasions. See *Eman* v. *Holder*, 130 S. Ct. 62 (2009) (No. 08-1317); *Viracacha* v. *Mukasey*, 129 S. Ct. 451 (2008) (No. 07-1363); *Kourouma* v. *Mukasey*, 128 S. Ct. 1868 (2008) (No. 07-7726); *Lopez-Cancinos* v. *Gonzales*, 550 U.S. 917 (2007) (No. 06-740).[4] No different disposition is warranted here. The court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenge to the denial of his request for asylum, and, in any event, resolution of the jurisdictional question would not change the outcome of petitioner's case.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's fact-bound claim. The ultimate question whether petitioner demonstrated to the satisfaction of the Attorney General the existence of extraordinary circumstances that might warrant consideration of an untimely claim for relief is committed to the Attorney General's discretion based on his own assessment of the circumstances. The INA provides that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or

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[4] This question is also presented in *Gomis* v. *Holder*, petition for cert. pending, No. 09-194 (filed Aug. 11, 2009).

extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). As the court of appeals explained (Pet. App. 11a), Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's intent that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006), in deciding whether to forgive the alien's default. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

In light of the nature of the determination committed to the Attorney General, Congress expressly barred judicial review of such a determination when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding the application of the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances [that] materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing." 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 13-14), his petition for review challenged a determination that he had failed to sufficiently demonstrate extraordinary circumstances to forgive that untimely filing. Judicial review of petitioner's challenge is therefore barred by 8 U.S.C. 1158(a)(3).

Significantly, however, an alien is not without an avenue for relief when the Attorney General determines that the alien has not demonstrated to his satisfaction

the existence of circumstances warranting consideration of the application for the discretionary relief of asylum notwithstanding his failure to file within the one-year deadline. The alien remains eligible for mandatory withholding of removal under 8 U.S.C. 1231. But in this case the IJ and the Board rejected that claim. The court of appeals sustained that determination, and petitioner has not sought review of the court of appeals' ruling in this Court.

Petitioner contends (Pet. 27-36), however, that judicial review of the rejection of his asylum claim as untimely should have been available as well, because, he asserts, this case falls within the provision in 8 U.S.C. 1252(a)(2)(D), enacted in 2005 as part of the REAL ID Act, that allows for judicial review of "questions of law." The structure of 8 U.S.C. 1158(a)(2) and (3) demonstrate, however, that Congress did not regard a fact-bound and discretionary determination by the Attorney General under Section 1158(a)(2)—that an alien had not shown to the Attorney General's satisfaction that there were circumstances that warranted forgiving his procedural default and consideration of his untimely application—to present matters of law of a sort appropriate for judicial review. The enactment of Section 1252(a)(2)(D) in 2005 did not fundamentally alter that judgment of Congress concerning the nature of the Attorney General's determinations about untimely asylum applications, and the court of appeals therefore correctly held that petitioner's challenge to the Board's fact-bound determination did not raise a "question[] of law."

In this case, the applicable principles are undisputed. Petitioner has not advanced any argument that the Board erred in construing the term "extraordinary circumstances," even assuming that the Attorney General's

application of that provision in the course of a determination under 8 U.S.C. 1158(a)(2) might be reviewable in some circumstances. Instead, petitioner takes issue with the Board's holding that he failed to adduce facts sufficient to show extraordinary circumstances warranting consideration of his untimely application. Pet. 32-33. As the court of appeals explained, petitioner's argument was "an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised." Pet. App. 15a; see *id.* at 10a (petitioner argued that "the IJ did not give appropriate weight" to his evidence of mental disability); *ibid.* ("the IJ did not think that [petitioner] presented sufficiently compelling circumstances to excuse his nearly five-year delay"). That determination is not a legal determination, but a factual determination involving judgment and discretion. If petitioner's fact-bound challenge to such a determination by the Attorney General raised a "question[] of law," then any error might be a question of law, thereby rendering the jurisdictional bar in 8 U.S.C. 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006)

Indeed, a challenge to such a determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction when it enacted 8 U.S.C. 1252(a)(2)(D). Congress added the exception for "constitutional claims or questions of law" in response to concerns this Court raised about reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the alien's petition for a writ of ha-

beas corpus "raise[d] a pure question of law"—whether, "as a matter of statutory interpretation," the Board erred n determining that he is not eligible for relief. *Id.* at 298. The alien did not challenge the Board's fact-finding, nor did he "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum." *Ibid. St. Cyr* distinguished those types of claims from a "pure legal claim" such as a statutory-interpretation issue, and only stated that precluding judicial review of the latter would raise serious constitutional questions. *Ibid.* (alien "d[id] not dispute any of the facts that establish his deportability or the conclusion that he is deportable"); see Pet. App. 13a.[5]

As the court of appeals explained (Pet. App. 13a-14a), the Conference Report accompanying the REAL ID Act demonstrates that Congress did not intend the courts of appeals to review the application of undisputed rules of law to the facts of particular cases. The Report made clear that a claim with both factual and legal elements (a "mixed question of law and fact") is not freely reviewable under Section 1252(a)(2)(D). H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005). Instead, the Report explained that when a court is presented with such a claim, it "should not review any factual elements," such as "questions that courts would review under the

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[5] As the court of appeals explained (Pet. App. 16a n.4), its holding that petitioner failed to present a "question[] of law" does not raise serious constitutional concerns, because although the *St. Cyr* Court said that "'entirely preclud[ing] review of a pure question of law by any court would give rise to substantial constitutional questions,'" it "did not suggest that the inability to review mixed questions of law and fact would raise constitutional concerns." *Id.* at 16a (quoting *St. Cyr*, 533 U.S. at 300).

'substantial evidence'" standard. *Id.* at 175-176. This Court has taken a similar approach in other contexts. For example, in *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-841 (1996), involving tort claims in district court, the Court concluded that "[t]he issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." In the INA, involving the special context of judicial review of agency action, Congress chose to preclude review of such fact-based determinations that arise in connection with an alien's request that the Attorney General exercise his discretion to forgive his procedural default and consider an untimely asylum application. Reading "questions of law" in 8 U.S.C. 1252(a)(2)(D) to encompass determinations such as those would have the opposite effect of what Congress intended when it committed certain determinations to the judgment and discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-487 (1999). Because petitioner brought a fact-bound challenge to a judgment call by the agency, his petition for review did not raise a "question[] of law" on this issue under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

2. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that a challenge to the Board's determination that an alien failed to demonstrate "extraordinary circumstances" that would warrant consideration of an untimely asylum application normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Gomis* v. *Holder*, 571 F.3d 353, 358-359 (4th Cir. 2009) (changed or extraordinary circumstances), petition

for cert. pending, No. 09-194 (filed Aug. 11, 2009); *Usman* v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (changed or extraordinary circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.) (changed or extraordinary circumstances), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 330-332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748-749 (6th Cir. 2006) (changed circumstances); *Sukwanputra*, 434 F.3d at 635 (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). Those courts have explained that a challenge to the Board's determination that an alien did not establish changed circumstances or extraordinary circumstances "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

The Ninth Circuit has held that an alien's challenge to the Board's determination that he has not established changed circumstances or extraordinary circumstances does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts,

sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[6]

That disagreement in the courts of appeals does not warrant this Court's attention at this time or in this case.

a. For several reasons, this case would not be a suitable vehicle for consideration of the issue petitioner seeks to raise. The court of appeals observed that the line between legal issues that can be reviewed and factual or discretionary determinations that cannot be reviewed "is occasionally difficult to draw." Pet. App. 14a. But here, the court concluded, it could determine its lack of jurisdiction "fairly readily" because it was "clear" the court was "being asked to review either factual determinations or the manner in which the agency weighed the various factors that inform its exercise of discretion." *Ibid.* This case therefore does not clearly present the issue petitioner seeks to raise. The court likewise found that this case did not fall within an exception recognized in several cases for the application of law to undisputed facts, noting that this case did not involve undisputed facts and distinguishing the Ninth Circuit's decision in *Ramadan*. See *id.* at 17a n.5. And finally, the Board in this case declined to find extraordinary circumstances on the *independent* ground that petitioner did not in any event file his application with a "reasonable" time (see pp. 20-21, *infra*), an inherently fact-based judgment. For these reasons, this case does not present an appro-

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[6] Petitioner cites (Pet. 23-26) a variety of cases concerning whether determinations other than whether an alien demonstrated changed or extraordinary circumstances to excuse an untimely asylum filing present "questions of law." Because whether a petition for review presents a "question[] of law" depends on the precise nature of the claim raised, those cases are inapposite.

priate occasion for consideration of the jurisdictional issue petitioner has identified.

b. Even if there were jurisdiction, petitioner could not show that the Board erred in failing to consider his untimely asylum application. The governing considerations, which are cast in general terms for the Attorney General to consider to his satisfaction, are undisputed. Petitioner does not contend that the Board used an incorrect legal standard. Instead, he argues that the Board erred in "appl[ying] the statutory standards to the historical facts of the case." Pet. 33.

Petitioner appears to have abandoned his argument that his lack of knowledge about the asylum process was an extraordinary circumstance warranting consideration of his untimely asylum application. In any event, the IJ made the factual finding that petitioner actually had been advised of the process, Pet. App. 49a-50a & n.5, and that finding is supported by substantial evidence. Petitioner now contends only that his psychological condition was an extraordinary circumstance that excused his untimely application. Pet. 11-12, 32-33. The IJ and Board rejected that claim on the ground that his mental health issues were not sufficiently serious to qualify as an extraordinary circumstance, Pet. App. 27a, 50a, and that finding would be reviewed under the substantial evidence standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). Petitioner has not attempted to show that the Board's fact-specific conclusions were not supported by substantial evidence.

But even if petitioner were correct that his mental health issues qualified as an extraordinary circumstance, that would not excuse the untimely filing of his

asylum application. It is well-established that in addition to showing changed or extraordinary circumstances, an asylum applicant must show that he filed his asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5). The IJ and Board declined to consider petitioner's untimely asylum application for a second, independent reason: the application was not filed within a reasonable period of time in light of the circumstances alleged. Pet. App. 27a, 32a-33a, 50a-51a. Before the court of appeals, petitioner argued only that the IJ erroneously held, as a matter of law, that "applying for asylum multiple years after the expiration of the one-year period is *per se* not reasonable," 06-3966 Pet. C.A. Br. 35 (internal quotation marks omitted)—he did not argue that waiting five years was reasonable in the facts of this case. The IJ plainly did not adopt a *per se* rule regarding reasonableness; rather, the IJ explained that because petitioner was able to obtain steady work, rent an apartment, and provide for his family, it was not reasonable for him to wait for five years before seeking asylum. Pet. App. 50a-51a. That determination is supported by substantial evidence, and petitioner has not challenged it in this Court. See Pet. 13, 32-33. Thus, even if the court of appeals had jurisdiction, the court of appeals would uphold the Board's determination that petitioner's untimely application does not warrant consideration because of his excessive delay in filing in light of the circumstances alleged.

c. In any event, petitioner's asylum claim fails on the merits. The court of appeals expressly upheld the Board's determination that any mistreatment petitioner suffered was not on account of a protected ground, and that finding is fatal to his asylum claim.

The court of appeals held that substantial evidence supports the Board's conclusion that the MQM's mistreatment of petitioner was not on account of his political opinion. Pet. App. 20a-21a. The court explained that petitioner testified that "the MQM extorted money and property from Pakistanis indiscriminately" and that "the MQM demanded payment from every person in [petitioner's] neighborhood, including those who had never joined the organization." *Id.* at 20a. Those facts, the court explained, refuted petitioner's claim that he was targeted because of his political opinion and suggested that "the MQM was motivated more by financial gain rather than political philosophy." *Ibid.* Moreover, the court observed, "MQM members began assaulting [petitioner] only after he stopped his payments and approached the police"—"not when he left the organization"—which supports the view that the MQM wanted money and "to avoid criminal prosecution," not to "punish [petitioner] for his political opinion." *Id.* at 21a.

An applicant for asylum, like an applicant for withholding of removal, must show that any persecution would be on account of a protected ground, namely, "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1231(b)(3)(A) (withholding of removal). Although the standards for asylum and withholding differ in terms of the probability of persecution required, they are the same in that both require this nexus to a protected ground. See, *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 429-430 (1984); see also Pet. 12 n.3 (acknowledging this fact). The court of appeals found that petitioner failed to satisfy this nexus requirement with respect to his claims of mistreatment by the MQM, and petitioner does not challenge that holding here. See Pet.

13 ("[T]hose merits rulings are not at issue in this petition."). As a result, petitioner's asylum claim fails on the merits. For this reason as well, this Court's review is unwarranted.[7]

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[7] Because jurisdiction to review the Attorney General's timeliness determination under 8 U.S.C. 1158(a)(2) in this case was precluded by the special jurisdictional bar in 8 U.S.C. 1158(a)(3), there is no need to consider whether jurisdiction was also precluded by 8 U.S.C. 1252(a)(2)(B)(ii), which bars jurisdiction to review any decision of the Attorney General that is specified under the relevant subchapter of the INA to be in the discretion of the Attorney General. There accordingly is no occasion to hold the petition in this case pending the Court's decision in *Kucana* v. *Holder*, No. 08-911 (argued Nov. 10, 2009), which concerns the scope of 8 U.S.C. 1252(a)(2)(B)(ii). (Section 1252(a)(2)(B)(ii) excepts from its bar "the granting of relief under section 1158(a)," but that exception refers to the granting (or denial) of the discretionary relief of asylum on the merits, not a determination concerning the one-year filing requirement.)

Moreover, even though petitioner filed a petition for review of the Board's denial of his motion to reopen, that does not provide a reason to hold the petition for the Court's decision in *Kucana*. The court of appeals considered the merits of petitioner's claim and concluded that the Board did not abuse its discretion in denying the motion to reopen, Pet. App. 22a-25a, and petitioner does not seek review of any issue concerning the denial of his motion to reopen.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ABDUL H. KHAN, YASMEEN HASEEB,
SARAH HASEEB, SANA HASEEB,

Petitioners,

—v.—

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The government does not dispute that there is a direct conflict on the question presented. BIO 12. Moreover, the conflict has now solidified into a 9-2 split. In *Ge v. Holder*, -- F.3d --, 2009 WL 4281472 (2d Cir. Dec. 2, 2009), the Second Circuit squarely held that it may review whether an asylum applicant satisfied the filing exceptions on the facts of his case.

The government also does not claim that the issue in this case is unworthy of the Court's attention. Although the government has consistently opposed review on vehicle grounds in prior cases on this issue, it has acknowledged that the issue is "important" (BIO 5 in *Kourouma v. Mukasey*, No. 07-7726 (2008)); a "recurring" one (BIO 10 in *Viracacha v. Mukasey*, No. 07-1363 (2008)); and that the conflict "may warrant this Court's attention in an appropriate case" (BIO 10 in *Eman v. Holder*, No. 08-1317 (2009)); *see also* BIO 9 in *Lopez-Cancinos v. Gonzales*, No. 06-740 (2007) (unsuitable vehicle).[1]

[1] The petition in *Viracacha*, No. 07-1363, was re-listed twice before being denied at the third conference.

Contrary to the government's contention, this case is not an unsuitable vehicle. The Seventh Circuit squarely addressed the question and there is no obstacle that would prevent this Court from reaching the issue.[2]

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION WILL ALLOW THE COURT TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT.

A. This Case Involves An Important And Recurring Question On Which The Courts Of Appeals Are Divided.

1. The government does not dispute that the circuits are splintered in both result and analysis, that the split is entrenched and longstanding, that eleven circuits have ruled on the issue, that further litigation in the lower courts will not eliminate the disagreement, and that this precise jurisdictional issue has arisen in hundreds of asylum cases over the past few years. Pet. 17-22.

Nor does the government dispute that the conflict hinges in significant part on contrary interpretations of *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), which only this Court can reconcile. *Compare, e.g., Ramadan v. Gonzales*, 479 F.3d 646, 652-54 (9th Cir. 2007) (per curiam) (Section 1252(a)(2)(D) must include claims involving the

[2] The jurisdictional issue in this case is also presented in *Gomis v. Holder*, No. 09-194, petition for cert. pending (filed Aug. 11, 2009).

application of law to fact because a "narrower interpretation would pose a serious Suspension Clause issue" under *St. Cyr*), *with* Pet. App. 16a n.4 (opinion below) (*St. Cyr* was concerned only with *pure* legal questions and "did not suggest that the inability to review mixed questions of law and fact would raise constitutional concerns"). *See also* Pet. 20-21, 28-31.

The government does take issue, however, with petitioner's characterization of Second Circuit law, citing *Chen v. United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006), for the proposition that the Second Circuit will not review whether an applicant's facts satisfy the filing exceptions. BIO 18. But *Ge* makes clear that the Second Circuit will review such claims.

As explained in the petition (at 18-19), the Second Circuit in *Chen* concluded that the petitioner in that case had not raised a reviewable claim involving the application of law to fact. 471 F.3d at 330. But *Chen* left no doubt that review is available under Section 1252(a)(2)(D) to review the application of law to fact. *Id.* at 324-28.

In *Ge*, the Second Circuit reversed the BIA's determination that petitioner had not satisfied the asylum filing exceptions, holding that it could review "the BIA's application of the 'changed circumstances exception'" to petitioner's facts. 2009 WL 4281472, at *4. In rejecting the government's jurisdictional position, the court explained that where an asylum applicant argues that there has been a

"misapplication" of the filing exceptions to the facts of his case, he is not merely "quibbling about factual findings." *Ibid.*

2. The government also does not dispute that Section 1252(a)(2)(D) is the centerpiece of the Immigration Act's judicial review scheme, that it has been cited in more than 1000 cases since its 2005 passage, or that the courts of appeals have generally adopted conflicting interpretations of the term "questions of law." The government contends, however, that the issue here does not have implications beyond asylum, because each case depends on the "precise nature of the claim" asserted in the petition for review. BIO 19 n.6. But contrary to the government's assertion, the "precise nature of the claim" does not alter the critical threshold question dividing the courts of appeals: whether, in general, the term "questions of law" is limited to *pure* legal issues or instead encompasses the application of law to fact (as six of nine circuits have held). Pet. 20; *see also* Pet. 23-27 (noting additional common questions). In any event, given the number of asylum cases affected by the conflict, this Court's review is warranted.

B. The Seventh Circuit's Decision Squarely Presents The Issue On Which The Circuits Are Divided.

The government cryptically argues that this case suffers from three vehicle problems. BIO 19. The government's contentions are incorrect. Notably, moreover, the government does not contend

that these vehicle problems would prevent the Court from reaching the jurisdictional question in this case.

1. The government argues that this is a poor vehicle because the Seventh Circuit believed that its lack of jurisdiction was "clear" in this case. BIO 19 (quoting Pet. App. 14a). But the Seventh Circuit has repeatedly reached the same result in numerous cases on this issue, and indeed, has consistently held that, in general, it may not review the application of law to fact. *Viracacha v. Mukasey*, 518 F.3d 511, 514-16 (7th Cir. 2008) (no jurisdiction to review whether facts satisfied the changed circumstances exception because the "application of law to fact" is not reviewable under Section 1252(a)(2)(D)); *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (no jurisdiction to review whether petitioner's facts satisfied statutory waiver provision because Section 1252(a)(2)(D) covers only "pure" questions of law).[3]

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[3] *See also Patel v. Holder*, 581 F.3d 631, 634 (7th Cir. 2009) (no jurisdiction over "changed" or "extraordinary" circumstances determination); *Ishitiaq v. Holder*, 578 F.3d 712, 716-17 (7th Cir. 2009); *Ghaffar v. Mukasey*, 551 F.3d 651, 654 (7th Cir. 2008); *Khan v. Mukasey*, 287 Fed. Appx. 537, 539 (7th Cir. 2008); *Huang v. Mukasey*, 525 F.3d 559, 563 (7th Cir. 2008); *Ogayonne v. Mukasey*, 530 F.3d 514, 519 (7th Cir. 2008); *Karim v. Mukasey*, 270 Fed. Appx. 433, 434 (7th Cir. 2008); *Mutitu v. Gonzales*, 2007 WL 1849451, at *2 (7th Cir. Jun. 27, 2007); *Kaharudin v. Gonzales*, 500 F.3d 619, 622-23 (7th Cir. 2007); *Herdiansyah v. Gonzales*, 224 Fed. Appx. 508, 514 (7th Cir. 2007); *Pupella v. Gonzales*, 207 Fed. Appx. 683, 685 (7th Cir. 2006); *Zeqiri v. Mukasey*, 529 F.3d 364, 369 (7th Cir. 2008); *Pavlyk v. Gonzales*, 469 F.3d 1082, 1086-87 (7th Cir. 2006); (continued...)

2. The government also relies on the Seventh Circuit's statement that Mr. Khan's case does not involve the application of law to "undisputed" facts because the facts were disputed before the *immigration judge*. BIO 19 (quoting Pet. App. 17a n.5). The government understandably does not elaborate on this point. As explained in the petition (at 33 n.15), the relevant question is not whether the facts were disputed at the trial level, but whether petitioner accepted the adjudicated facts on appeal and argued that those established facts satisfied the statutory standard. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defining mixed question as one where the law is applied to the "admitted *or* established" facts) (emphasis added).

3. Finally, the government suggests that review is not warranted because the BIA concluded that petitioner had not filed within a "reasonable" period after the one-year deadline and that this was

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(...continued)
Sanchez-Melo v. Gonzales, 195 Fed. Appx. 526, 530 (7th Cir. 2006); *Chun Lin Zhao v. Gonzales*, 177 Fed. Appx. 499, 501 (7th Cir. 2006); *Disha v. Gonzales*, 207 Fed. Appx. 694, 697 (7th Cir. 2006); *Sokolov v. Gonzales*, 442 F.3d 566, 568 (7th Cir. 2006); *Ikama-Obambi v. Gonzales*, 470 F.3d 720, 724 (7th Cir. 2006); *Berinde v. Gonzales*, 203 Fed. Appx. 732, 735 (7th Cir. 2006).

an "*independent* ground" for the BIA's decision. BIO 19 (emphasis in original).[4]

The government does not contend, however, that the BIA's "reasonable period" ruling would prevent this Court from squarely addressing whether the Seventh Circuit had jurisdiction to review the "extraordinary circumstances" exception. Indeed, the Seventh Circuit's analysis did not even mention the BIA's "reasonable period" conclusion, much less attach independent jurisdictional significance to it. Thus, it would be for the Seventh Circuit, on remand, to decide whether it had jurisdiction to review the "reasonable period" determination.

In any event, even if the BIA's "reasonable period" ruling were at issue, that would not make this case a poor vehicle, but a more comprehensive one, given that both the Second and Ninth Circuits have concluded that they may review whether an applicant filed within a "reasonable" period of time. *See Ge*, 2009 WL 4281472, at *4 (reviewing and reversing BIA's determination that application was not filed within a "reasonable time after a change of circumstances"); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-79 (9th Cir. 2008) (reviewing "reasonable

[4] The "reasonable period" requirement was added by implementing regulations. 8 C.F.R. 208.4(a)(4); 208.4(a)(5). Pet. App. 75a-78a.

period" determination); *Wakkary v. Holder*, 558 F.3d 1049, 1057-58 (9th Cir. 2009) (same).[5]

C. The Government's Speculation That Mr. Khan May Not Prevail On Remand Is Not A Basis On Which To Deny Review Of The Jurisdictional Issue In This Case.

1. The government does not contend that the Seventh Circuit addressed whether Mr. Khan satisfied the exception for extraordinary circumstances. The government's speculation that petitioner would not be able to do so on remand is incorrect and should not be the basis for denying review of the jurisdictional question here. As discussed below, Mr. Khan will be able to show that the statutory exception was incorrectly applied to his case. *See infra* Section II.B (explaining that the IJ and BIA misapplied the statutory exception by requiring that an applicant with post-traumatic symptoms show that he was unable to engage in normal life activities). Moreover, the government incorrectly assumes that petitioner's claims would necessarily be evaluated under the substantial evidence test. *But see Ornelas v. United States*, 517

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[5] Contrary to the government's contention (at 19), a "reasonableness" determination does not involve an inherently factual inquiry, and necessarily turns on the legal context in which the term is used. *See, e.g., United States v. Irvine*, 511 U.S. 224, 234-35 (1994); *Muehler v. Mena*, 544 U.S. 93, 98 & n.1 (2005).

U.S. 690, 699-700 (1996) ("*de novo*" review proper for assessing the application of law to fact).[6]

2. The government alternatively speculates (at 20-21) that Mr. Khan's asylum application would be denied on the merits because he will not be able to show the requisite nexus between his political opinion and his treatment at the hands of the MQM. BIO 21-22. The government, however, fails to take into account that Mr. Khan can prevail on his asylum claim by showing *future* persecution if his claim is remanded to the agency. And because it is impossible to predict the conditions in Pakistan at the time of a remand, much less the role that the MQM will play in Pakistan, the government's speculation should not be a basis for denying the petition. *See* U.S. Dep't of State, 2008 Country Reports on Human Rights Practices: Pakistan (MQM is politically powerful and violent), http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119139.htm.

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[6] The government also incorrectly argues that the BIA's reasonable period determination would be upheld if the Seventh Circuit had jurisdiction. BIO 21. But the agency's reasonable period determination suffers from the same legal flaw as the agency's "extraordinary circumstances" ruling: it incorrectly required petitioner to show that he was literally debilitated in all parts of his life. *See infra* Section II.B.

The government further claims (at 21) that petitioner argued in the Seventh Circuit only that the BIA's "reasonable period" determination was *per se* erroneous. That is incorrect. *See* Pet. C.A. Br. 35 (noting, among other things, that ruling was erroneous in Mr. Khan's "situation").

3. Finally, the government suggests that petitioner's inability to apply for asylum is of diminished importance because he was able to apply for withholding. BIO 11, 14. But Congress has made both forms of relief available, and asylum is the principal form of relief for refugees. *See* Amicus Brief 2-4 (brief by asylum experts), *filed in Gomis v. Holder*, *supra*, No. 09-194.[7]

II. THE SEVENTH CIRCUIT'S DECISION WAS INCORRECT.

A. Section 1252(a)(2)(D) Covers The Application Of Law To Fact.

The government agrees with the court of appeals that the preclusion of all review over "mixed questions of law and fact" would not raise "constitutional concerns." BIO 16 n.5 (internal quotes omitted). Yet the government does not address the fact that this Court in *St. Cyr* specifically recognized that habeas review has always included review of the proper "application" of the laws. 533 U.S. at 302. And, critically, both the government and Seventh Circuit wholly ignore *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting and reaffirming *St. Cyr*'s analysis of the scope of habeas review); Pet. 27-31.

Instead, the government (and Seventh Circuit) rely on a sentence in the Conference Report stating

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[7] Contrary to the government's implication (at 9), Mr. Khan did not act improperly in appealing his case rather than voluntarily returning to a country where he feared persecution.

that courts can review the "legal" but not the "factual" aspects of a mixed question. BIO 16-17; Pet. App. 14a. But that says nothing about the Suspension Clause. It also says nothing about whether Congress intended to limit the term "questions of law" to an artificial subset of pure legal claims. As the Report makes expressly clear, that question must be answered by reference to the traditional scope of habeas law. *See* Pet. 27-29.

Finally, the government states that Congress did not mean to alter "fundamentally" its 1996 decision to eliminate review of the asylum filing exceptions. BIO 14. But that was the precise purpose of Section 1252(a)(2)(D): to restore review of previously barred claims to the extent such review was traditionally available in habeas. *See* Pet. 5-8, 27-31.

B. Petitioner's Claim Involves The Application Of Law To Fact.

1. Significantly, the government does not claim that Mr. Khan sought to challenge the underlying historical facts found by the IJ. Rather, the government carefully argues that Mr. Khan's claim is "fact-bound." BIO 14. But that is the definition of a claim involving the application of law to fact: whether the established facts satisfy the statutory standard. The government is thus wrong in arguing (at 15) that Mr. Khan's claim is unreviewable because he "takes issue with the Board's holding that he failed to adduce facts

sufficient" to satisfy the exception for extraordinary circumstances.

The government also argues that Mr. Khan's claim is unreviewable because the "applicable principles are undisputed." BIO 14. But the applicable principles are undisputed only in the sense that the IJ and BIA properly stated – at the most general level – that petitioner had to show extraordinary circumstances related to his failure to timely file his application. As this Court has repeatedly explained, however, a legal standard will often be set forth at a highly general level and will necessarily "acquire content only through application." *Ornelas*, 517 U.S. at 697. *See* Pet. 33-34. Thus, even where the BIA correctly states the general standards governing changed or extraordinary circumstances, it has often "effectively" narrowed the exceptions through "misapplication" of those general standards. *Ge*, 2009 WL 4281472, at *4.

Here, the IJ did not dispute the basic historical fact that Mr. Khan suffered from post-traumatic symptoms. But the IJ noted that petitioner was working and engaging in other normal life activities. Pet. App. 50a The BIA thus affirmed the IJ's ruling that petitioner had not satisfied the statute, reasoning that petitioner was not "unable" to file a timely application. Pet. App. 27a. But that view of the statute is wrong.

The statute states only that the circumstances must "relate" to the untimely filing. 8 U.S.C. 1158(a)(2)(D). It does not require an applicant to be literally unable to function. *See, e.g.*, Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 703-04 (Summer 2008) (noting that this is a common error of the BIA in interpreting the statute, and explaining that, unlike regular life activities, the filing of an asylum application is a direct reminder of the abuses). *See also* Amicus Brief in *Gomis*, at 17-21 (noting examples where BIA found no extraordinary circumstances because the applicant was capable of working, paying bills or attending church).

2. The government also notes that the statute provides that the Attorney General "may" excuse a late-filed application if the applicant satisfies the threshold statutory eligibility criteria (*i.e.*, changed or extraordinary circumstances). BIO 12-13. But the fact that a statute may vest the ultimate decision in the agency's discretion does not mean that the threshold statutory eligibility criteria are likewise discretionary and unreviewable. *St. Cyr*, 533 U.S. at 307-08.[8]

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[8] The petition addressed (at 34-35) the statute's use of the phrase "to the satisfaction," and the government has not responded to those arguments.

Finally the government is wrong that review of Mr. Khan's claim would "convert every" claim into a question of law. BIO 15. Review of his claim does not mean that the courts could review findings of historical fact or any ultimate discretionary authority the IJ may possess.

* * * *

This case will allow the Court to decide a recurring and important issue that has divided the circuits for many years. Review is warranted.

CONCLUSION

The petition should be granted.[9]

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[9] If the Court chooses to grant review on this issue, but to do so in *Gomis*, No. 09-194, petitioner respectfully requests that the Court hold his case pending the outcome of *Gomis*.

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